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In the Supreme Court of the United States

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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QUESTIONS PRESENTED

I. Whether a federal court violates fundamental principles of federalism and comity when it regulates a local child-neglect and foster-care system based solely on local law enforceable by local family law courts.

II. Whether a federal court violates fundamental principles of federalism and comity when it decides constitutional claims arising out of child-custody matters at the behest of plaintiffs who are parties to proceedings in local family law courts where these claims may be raised.

PARTIES

This action was certified as a class action in the United States District Court for the District of Columbia. The lead plaintiff in that court, who is the lead respondent in this Court, is LaShawn A., by her next friend, Evelyn Moore. The petitioners in this Court are: Sharon Pratt Kelly, Mayor of the District of Columbia; Vincent C. Gray, Director, District of Columbia Department of Human Services ("DHS"); Clarice Dibble Walker, Commissioner of DHS's Commission on Social Services; Dr. Beverly Davis, Administrator of DHS's Family Services Administration; and Marilynn Riley, Chief of DHS's Child and Family Services Division. Petitioners appear in this Court in their official capacities as successors in interest to the original defendants, all of whom were sued in their official capacities: Marion Barry, Jr., Peter Parham, Barbara Burke-Tatum, Jean R. Hunter, and Evelyn Andrews.

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Sharon Pratt Kelly, Mayor of the District of Columbia, and Vincent C. Gray, Clarice Dibble Walker, Dr. Beverly Davis, and Marilynn Riley, officials of the District of Columbia, petition this Court for a writ of certiorari to review a decision of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The April 16, 1993, decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 990 F.2d 1319. App. 1a-14a. The April 18, 1991, decision of the United States District Court for the District of Columbia is reported at 762 F. Supp. 959. App. 15a-95a.

The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291. Following its decision, petitioners filed a timely petition for rehearing and a suggestion for rehearing *en banc*. The petition and suggestion were denied on August 9, 1993. App. 95a-97a.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves provisions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473, codified in part in D.C. Code § 11-101 *et seq.* and § 11-1101 (1989 repl.); the Prevention of Child Abuse and Neglect Act of 1977 ("Abuse and Neglect Act"), D.C. Law 2-22 (1977), D.C. Code §§ 2-1351 to -1357, §§ 6-2101 to -2107, §§ 6-2121 to -2127, §§ 16-2301 to -2331, & §§ 16-2351 to -2365 (1988 & 1989 repl.); and the Youth Residential Facilities Licensure Act of 1986 ("Licensure Act"), D.C. Law 6-139 (1986), D.C. Code §§ 3-801 to -808 (1988 repl.).

The portions of these statutory provisions that are important to this petition are reproduced in a statutory appendix.

STATEMENT OF THE CASE

I. INTRODUCTION.

The protection and care of abused and neglected children have long been recognized as the special responsibilities of local government. To safeguard the interests of these children and of their parents, the States and the District of Columbia have enacted comprehensive legislation concerning child abuse and neglect, foster care, termination of parental rights, adoption, and related matters. These jurisdictions also have established specialized family courts to administer these laws. In recent years, moreover, as the problems of abused and neglected children and their families have multiplied and thereby stretched local resources, Congress has enacted legislation to assist the States and the District in addressing these problems.

This action was brought to secure federal court oversight of the District of Columbia's administration of its child-neglect and foster-care system. It was brought on behalf of District children reported to be neglected or abused, but not in the custody of the District, and on behalf of children in the District's child-neglect and foster-care system. Its principal aims were two-fold: (1) to secure services for families that would prevent the removal of abused and neglected children

from home or that would permit them to return home and (2) if a return home were not possible, to terminate parental rights expeditiously in order to increase the likelihood of adoption.

Plaintiffs sought relief principally under federal statutes and the Constitution. In the case of federal legislation, they claimed that the Child Abuse Prevention and Treatment Act[1] and the Adoption Assistance and Child Welfare Act of 1980,[2] confer rights on children that are enforceable pursuant to 42 U.S.C. § 1983. Plaintiffs also sought relief under District of Columbia law.

The United States District Court for the District of Columbia, the Honorable Thomas F. Hogan, ruled that the District's child-neglect and foster-care system violated federal legislation and the Constitution. Based on these rulings, the parties negotiated, and he approved, a far-reaching remedial order. In that order, the District reserved the right to challenge his liability rulings.

On appeal, the United States Court of Appeals for the District of Columbia Circuit held that Judge Hogan need not have abstained from reaching the constitutional issues in this case. At the same time, however, it refused to decide whether federal law provides a basis for a federal court to supervise the operation of the District's child-neglect and foster-care system. Instead, the court held that Judge Hogan could and should exercise supervision solely under local law. The court so ruled even though Congress has conferred exclusive jurisdiction of neglect and adoption matters on the District's local courts and even though the District of Columbia laws cited by the court have never been interpreted by the District of Columbia courts to provide the authority it posited.

The decision of the D.C. Circuit contravenes fundamental principles of federalism and comity. The court seriously erred

[1] 88 Stat. 4 (1974), 42 U.S.C. §§ 5101-5106, as added 102 Stat. 110 (1988), and renumbered 103 Stat. 764 (1989), 42 U.S.C. § 5106a.

[2] 94 Stat. 500, codified in Title IV-B of the Social Security Act, 42 U.S.C. §§ 620-627, and in Title IV-E, 42 U.S.C. §§ 670-679.

in holding that a federal court may, without any federal basis whatsoever, supervise the District's compliance with its laws governing the protection of abused and neglected children, including foster care, termination of parental rights, and adoption. The D.C. Circuit also seriously erred in ruling that a federal court may decide the constitutional claims of litigants who are parties to local family court proceedings even though these claims may be raised in those local court proceedings.

II. DISTRICT OF COLUMBIA LAW GOVERNING ABUSED OR NEGLECTED CHILDREN, FOSTER CARE, TERMINATION OF PARENTAL RIGHTS, AND ADOPTION.

The District of Columbia, like each of the States, has a comprehensive statutory framework governing the identification and protection of abused or neglected children, foster-care arrangements for such children, termination of parental rights, and adoption. The District, like each of the States, also has a specialized family-court system for administering these laws. The District's system became a purely local system in 1970 when Congress enacted the District of Columbia Court Reform and Criminal Procedure Act of 1970.[3] In the Court Reform Act, Congress created an independent local court system for the District of Columbia and conferred on the Family Division of the District of Columbia Superior Court "exclusive jurisdiction" of neglect and adoption proceedings. See D.C. Code § 11-1101(9) & (13) (1989 repl.).

One of the centerpieces of the District's framework for protecting children is its Abuse and Neglect Act of 1977. In simplified form, the Act provides that the District's Department of Human Services ("DHS") shall investigate within

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[3] Pub. L. 91-358, 84 Stat. 473, now codified in part in D.C. Code § 11-101 *et seq.* and § 11-1101 (1989 repl.). This Court previously has construed the Court Reform Act in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Key v. Doyle*, 434 U.S. 59 (1977); and *Palmore v. United States*, 411 U.S. 389 (1973).

24 hours reports of neglected children and that the Metropolitan Police Department shall "immediately" investigate reports of abused children. D.C. Code §§ 6-2102(b) & 6-2103(c). In these investigations, a preliminary determination is made whether a child should be removed from his home or whether the child "can be protected by the provision of services or resources." D.C. Code § 6-2105(a) & (b). A parent may also voluntarily place his child in the custody of the District on an emergency basis. D.C. Code § 6-2124(c)(1). A child may remain in this status for only 90 days unless his parent renews the emergency care agreement or unless DHS requests the District's Office of the Corporation Counsel to file a neglect petition in the Family Division of the Superior Court. D.C. Code § 6-2123(a)(2).

D.C. Code § 16-2301 *et seq.*, which governs judicial protection of children believed to be abused or neglected, is another centerpiece of the District's child-welfare system. The Family Division of the Superior Court oversees every important decision concerning such children — *e.g.*, whether they have, in fact, been abused or neglected and, if so, how they should be cared for. D.C. Code §§ 16-2312, 16-2313, 16-2317, 16-2320, 16-2322, 16-2323. The Family Division conducts evidentiary hearings on each of these matters after notice to all interested parties. D.C. Code §§ 16-2312, 16-2317, 16-2320. In these proceedings, a child is entitled to counsel, who is compensated by the District, as are his parent(s), if they cannot afford counsel. *Id. See also* D.C. Code § 16-2304.

The District has established several overriding principles to govern neglect proceedings, including preserving family life and ensuring child safety. For example, the rules of the Superior Court, which have been adopted by its Board of Judges with the approval of the District of Columbia Court of Appeals, provide:

> These rules are intended to provide for the just determination of *every* neglect proceeding. They shall be construed *to preserve family life to the maximum extent possible consistent with the child's right to*

> *safety, adequate parental care, permanence and continuity of relationships*. The rules further adopt the principle that when a child is removed from his or her own home, the Court shall endeavor to secure for the child custody, care and discipline as nearly as possible equivalent to that which should have been given by the parents . . ..

SCR-Neglect Rule 2 (emphasis added). In addition, District law provides that, if the Family Division finds that a child is neglected, it shall make a disposition "in the best interest of the child . . . except that no child shall be ordered placed outside his or her home unless the Division finds that the child cannot be protected in the home and there is an available placement likely to be less damaging to the child than the child's own home." D.C. Code § 16-2320(a).

The Family Division periodically reviews dispositional orders, either every six months or yearly depending on the age of the child and other circumstances. D.C. Code § 16-2323(a). At these hearings, the Family Division considers the extent to which a parent(s) has visited his or her child; whether and when a child may be returned home; and whether DHS intends to request the Office of the Corporation Counsel to file a motion to terminate parental rights and, if not, why not. D.C. Code § 16-2323(b).

The final centerpiece of the District's framework for protecting abused or neglected children is the law governing termination of parental rights and adoption, D.C. Code §§ 16-2351 to -2365. These provisions are intended to "encourage stability in the lives" of children by terminating the rights of parents who are no longer capable of caring for them, "*ensure that the constitutional rights of all parties are recognized and enforced*," and "increase opportunities for the prompt adoptive placement of children for whom parental rights have been terminated." D.C. Code § 16-2351(a)(1), (2) & (3) (emphasis added). To accomplish these goals, the law provides that the parties to a proceeding to terminate parental rights must include the child, his parent(s), and the agency having custody of the child. D.C. Code § 16-2356. In addi-

tion, in the case of a child who has been adjudicated abused or neglected and committed to the District's custody for more than 18 months and for whom no hearing on a motion to terminate parental rights has been held within the preceding 12 months, the law provides that the Family Division shall hold a review hearing to determine why a motion to terminate the parent-child relationship has not been filed; such hearings are thereafter held annually if necessary. D.C. Code § 16-2355(a) & (b).

Following a judicial determination that parental rights should be terminated, the District assumes legal custody of the child and attempts to place the child permanently. D.C. Code § 16-2360. If an adoptive placement is not made within six months of an order terminating parental rights, the Family Division monitors the District's efforts and has the power to issue orders to effectuate such a placement. D.C. Code § 16-2360(b).

III. PROCEDURAL HISTORY.

A. United States District Court.

This case was brought as a class action against the District of Columbia on behalf of two classes of children: (1) children about whom reports of neglect or abuse have been made and (2) abused or neglected children who enter the District's foster-care system. The complaint alleged federal statutory and constitutional claims and sought injunctive relief. The complaint also alleged pendent District-law claims.[4]

The District moved to dismiss on several grounds, including abstention and failure to state a claim, and it opposed certification of the action as a class action. Judge Hogan

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[4] The District was not named as a party. Instead, the defendants, all of whom were sued in their official capacities, were the Mayor and District child-welfare officials. See App. 16a n.2; App. 18a n.3; App. 72a n.25. Because the defendants were sued only in their official capacities, this action, as a practical and legal matter, was and is an action solely against the District. *See Kentucky v. Graham*, 473 U.S. 159, 165-68 (1985).

denied the motion to dismiss and certified the case as a class action.

Following a bench trial, Judge Hogan ruled, on April 18, 1991, that the District's operation of its child-neglect and foster-care system violated (1) the federal Abuse Prevention and Adoption Assistance Acts; (2) the substantive component of the Due Process Clause of the Fifth Amendment; and (3) the procedural component of the Due Process Clause. The procedural due process ruling was based on the theory that the District's Abuse and Neglect Act, its Licensure Act, and DHS's internal operating manual create liberty interests within the meaning of the Due Process Clause of the Fifth Amendment. App. 15a-94a.

1. Findings of Fact. Judge Hogan found that the District violated in two respects the federal statutory rights of children who are reported to be abused or neglected but who are not in the District's foster-care system. First, DHS failed to initiate prompt investigations of reports of neglect. App. 33a-36a. Second, DHS failed to provide services "to enable children to remain with their families or reunite with them if temporary placement is required" in violation of the "reasonable efforts" plan requirement of 42 U.S.C. § 671(15). App. 37a; see also App. 36a-37a. Such conduct, Judge Hogan also ruled, violates District law. App. 33a-37a.

In the case of children in foster care, Judge Hogan found violations of federal statutes, and District law and policy. For example, in the case of children voluntarily committed to the custody of DHS by their parent(s), DHS failed to return them home in a timely fashion. App. 38a. In addition, children were not placed in the "least restrictive" placement. App. 39a.

Judge Hogan also found that DHS was violating local law and agency policy by failing to " 'prepare a permanent plan' " for the placement of children who cannot be returned home within a reasonable time. App. 46a. More specifically, DHS was not expeditiously seeking to terminate parental rights or referring children who had been freed for adoption to its Adoption and Placement Resources Branch. App. 47a.

2. **Legal Rulings.** Judge Hogan ruled that 42 U.S.C. § 1983 is available to redress violations of both the federal Adoption Assistance Act and the Abuse Prevention Act. App. 73a-76a. In so ruling, he rejected the District's argument that "the federal statutes relied upon by plaintiffs merely establish state grant programs and do not create actionable rights . . .." App. 74a.

Despite his broad federal statutory rulings, Judge Hogan found it necessary to determine whether the District's failings also violated the Constitution. A constitutional ruling was necessary because, if the District decided to forego federal funding, "the Court would have *no basis* for enforcing any injunction it might order." App. 78a (emphasis added).

Judge Hogan then turned to the scope of plaintiffs' liberty interests and the scope of the District's constitutional duties. First, relying on *Youngberg v. Romeo*, 457 U.S. 307 (1982), and *Hutto v. Finney*, 437 U.S. 678 (1978), Judge Hogan ruled that "plaintiffs have a liberty interest in safe conditions" arising under the substantive component of the Due Process Clause (App. 82a) and more specifically "a right to reasonably safe placements in which they will not be harmed." App. 83a. "This right," moreover, "extends to safety from psychological and emotional harm." App. 83a, citing *Carey v. Piphus*, 435 U.S. 247 (1978). Relying on *Youngberg*, Judge Hogan also ruled that plaintiffs have a liberty interest in specific services:

> To the extent that certain services, such as appropriate placements and case planning, are essential to preventing harm to the children in the District's custody, this Court holds that the children have a constitutional liberty interest in those services.

App. 84a.

In addition, citing *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Taylor By and Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989), Judge Hogan ruled that the District's own statutes

and DHS's Manual of Operations create constitutionally protected interests because they provide specific standards for safeguarding children who are reported to be neglected or abused or who are in the District's foster-care system. App. 84a-86a.

Finally, Judge Hogan ruled that the District had violated plaintiffs' liberty interests in freedom from harm:

> The facts . . . establish beyond any doubt that defendants have failed to protect these plaintiffs from harm — whether physical, psychological, or emotional — by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things.

App. 90a.

The parties then negotiated an 84-page remedial order ("Final Order") conforming to Judge Hogan's sweeping federal liability rulings. In this order, the District expressly reserved the right to appeal the liability decision and the parties agreed that the Final Order and any implementation plan(s) would be null and void to the extent that Judge Hogan's liability rulings did not withstand appellate review. Judge Hogan entered a final judgment approving the Final Order on August 27, 1991. App. 98a.

B.–The Court of Appeals.

A three-judge panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. It ruled that *Younger* abstention,[5] as explicated in *Moore v. Sims*, 442 U.S. 415 (1979), did not require Judge Hogan to abstain from deciding the constitutional claims of children who are parties to Family Division proceedings because, in its view, these claims are "multi-faceted" and thus broader than the claims within the purview of the Family Division. App. 4a-9a. The panel made this determination even as it acknowledged the three types of proceedings in the Family Division designed

[5] *Younger v Harris*, 401 U.S. 37 (1971).

to protect the interests of abused or neglected children: "(1) a 'neglect proceeding' adjudicating a neglect petition filed by the Corporation Counsel against the child's parents, (2) periodic review hearings, and (3) proceedings adjudicating motions to terminate parental rights." App. 6a. According to the panel, "[n]one of these proceedings is an appropriate forum for this multi-faceted class-action challenge to the District of Columbia's administration of its entire foster-care system." App. 6a. See also App. 8a ("In sum, there was no pending judicial proceeding in the District of Columbia which could have served as an adequate forum for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law.").

Despite ruling that abstention was not required, the panel refused to decide the merits of what it regarded as "the complex constitutional and federal statutory issues in this case," including the District's argument that *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), required reversal of Judge Hogan's ruling that the federal statutes relied on by plaintiffs were enforceable pursuant to 42 U.S.C. § 1983. App. 9a. It was unnecessary to reach these "complex" issues because, according to the panel, "[t]he District of Columbia's statutes and regulations provide a scheme for the protection and care of foster children, and children reported to be abused or neglected, that is equally as comprehensive as that provided by the federal statutes and is appropriately before us under our pendent jurisdiction." App. 9a.

Thus, the requirements of the District's local Abuse and Neglect Act, its Licensure Act, and DHS's Manual of Operations "parallel almost precisely the requirements contained in the relevant federal laws." App. 9a. Furthermore, "DHS has violated District law as well as federal law by failing, for example, to initiate timely investigations into reports of abuse or neglect, to provide services to families in order to prevent the placement of children in foster care, to place those who may not safely remain at home in appropriate foster homes and institutions, to develop case plans for

children in foster care, and to move children into a situation of permanency." App. 9a-10a. Finally, although unwilling to resolve the District's *Suter* challenge to Judge Hogan's federal statutory rulings, the panel seized the opportunity to rule — erroneously we believe — that the District's child-neglect and foster-care laws are enforceable by private rights of action. App. 10a-13a.

Insofar as the remedial order is concerned, the panel ordered Judge Hogan to reenter it, if possible, even though it had been negotiated by the parties on the basis of his sweeping federal liability rulings — rulings that the panel had declined to affirm. The only caveat the panel mentioned is that the decree may not be reentered to the extent Judge Hogan finds, on remand, that, under *Suter*, the decree improperly rests solely on federal statutory law. App. 13a-14a.

The District unsuccessfully sought rehearing and rehearing *en banc*. Two judges (Buckley & Williams, JJ.) would have granted the suggestion for rehearing *en banc* for the purpose of certifying to the District of Columbia Court of Appeals a threshold issue concerning the only basis of liability found by the panel — whether the District of Columbia laws identified by Judge Hogan are enforceable by a private right of action. Judge Ruth Bader Ginsburg did not participate. App. 97a.

REASONS FOR GRANTING THE WRIT

This case concerns fundamental questions of federalism and comity that are of great importance to the States and the District of Columbia and to their independent judiciaries. The D.C. Circuit has erroneously ruled that a federal court may decide custody-related constitutional claims of children who are parties to proceedings in local family law courts, even when these claims constitute the very *raison d'etre* of family law courts — whether children have been abused or neglected; whether they should be removed from their homes, and, if so, where they should be placed in foster care; whether the rights of their parents should be terminated; and adoption. Even worse, the D.C. Circuit has erroneously ruled that a

federal court may exercise jurisdiction over these children, and children reported to be abused or neglected, based solely on local child-welfare laws enforceable by the independent court systems of the States and the District of Columbia. The D.C. Circuit issued its local-law rulings, moreover, without even certifying to the highest court of the District of Columbia the critical issue whether District law creates private rights of action.

Each of these decisions flagrantly disregards the principles of federalism and comity underlying the diverse strands of this Court's abstention jurisprudence and conflicts with the fundamental premises of other federal appellate court decisions. The D.C. Circuit's no-abstention decision is in conflict with the principles of *Younger v. Harris*, 401 U.S. 37 (1971), as extended in *Moore v. Sims*, 442 U.S. 415 (1979). In *Moore*, this Court ruled that federal courts should abstain from deciding constitutional challenges to state child abuse and neglect systems when the plaintiffs in the federal action may raise these challenges in state judicial proceedings to which they are also parties. Under *Moore*, the D.C. Circuit erred in ruling that the district court need not have abstained from deciding the constitutional claims of children who are parties to proceedings in the Family Division of the Superior Court of the District of Columbia where these claims may be resolved.

The D.C. Circuit's pendent-jurisdiction decision conflicts with the principles set forth in *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), and *Ackenbrandt v. Richards*, 112 S. Ct. 2206 (1992). *Gibbs* and *Ackenbrandt* together preclude federal courts from entertaining pendent family-law claims. The D.C. Circuit, however, has ordered massive relief against the District, based solely on its interpretation of local law governing important family-law matters which have been entrusted by Congress to the District's local courts. The D.C. Circuit has done so, moreover, by erroneously interpreting settled local law and by resolving unsettled issues of local law.

The rulings for which review is sought constitute a serious intrusion into family-law matters that are properly the province of the courts of the District of Columbia. Congress has granted to the Family Division of the Superior Court exclusive jurisdiction of neglect and adoption matters and has authorized the District's local court system to decide the future of abused and neglected children in accordance with a comprehensive legal framework that expressly includes consideration of constitutional rights and that is otherwise sufficiently broad to encompass any such rights. Insofar as local family law is concerned, a federal court simply has no business construing such legislation in order to decide child-custody matters. A federal court, in contrast to a local family law court, has no expertise in child-custody matters and a federal court, in contrast to a local family law court, does not have before it the parents of children who, of course, have a constitutionally protected interest in their children.

As this Court ruled in *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 11 n.9 (1987), "[t]he various types of abstention are not rigid pigeonholes into which federal courts must try to fit cases," but "[r]ather . . . reflect a complex of considerations designed to soften the tensions inherent in a system that contemplates parallel judicial processes." The D.C. Circuit's decision in this case has unnecessarily and wrongly exacerbated these tensions and, if allowed to stand, is likely to serve as a model for sweeping litigation in the federal courts in each of the 50 States.[6] The result would be unwise and contrary to the principles of federalism and comity that this Court repeatedly has upheld. Federal courts, with no authority to terminate parental rights or to approve adoptions, with no family law expertise, and without parents before them, should not be overseeing the operation of specialized local courts which have the legal authority to act with due regard to the interests of all affected persons.

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[6] Federal courts already have substantially intruded into this area. See National Center for Youth Law, "Foster Care Reform Litigation Docket" (1993) (collecting numerous federal court child-neglect and foster-care cases in 16 States).

I. THE RULING THAT A FEDERAL COURT IS FREE TO DECIDE CUSTODY-RELATED CONSTITUTIONAL CLAIMS OF CHILDREN WHO ARE PARTIES TO FAMILY DIVISION PROCEEDINGS IN WHICH THEY MAY RAISE THESE CLAIMS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER FEDERAL APPELLATE COURTS.

A. This Court's Rulings.

This Court has ruled that federal courts should not decide constitutional claims at the behest of a federal plaintiff when that plaintiff is a party in a state judicial proceeding in which he has the opportunity to raise these claims. This Court has also ruled that lower federal courts do not have the power to review the decisions of the District of Columbia's independent judicial system. The decision of the D.C. Circuit that Judge Hogan did not err in deciding the constitutional claims of children who are parties to proceedings in the District's family law court violates both of these principles.

In *Younger v. Harris*, *supra*, this Court ruled that, in the absence of exceptional circumstances, not present here, a federal court may not enjoin, or otherwise interfere with, a pending state criminal prosecution. In *Moore v. Sims*, *supra*, this Court extended *Younger* to state child abuse and neglect proceedings and ruled that federal courts should abstain from deciding constitutional challenges to state child abuse and neglect systems when the federal plaintiffs have an opportunity to raise these challenges in state proceedings to which they also are parties.

In *Moore*, state officials removed children from their parents' custody without a hearing after concluding that their parents were abusing them; the officials thereafter successfully brought suit for emergency protection of these children in state court. The parents responded by filing in federal court a broad-based constitutional challenge to the state child abuse and neglect system and sought to enjoin state officials from pursuing the state court proceeding against them.

A three-judge federal court entered an injunction forbidding state officials "from filing or prosecuting any state suit under the challenged state statutes until a final determination" of constitutionality of the state's child-welfare scheme. It ruled that *Younger* abstention "was unwarranted because the litigation was '*multifaceted*,' involved custody of children, and was the product of procedural confusion in the state courts . . .." 442 U.S. at 422 (emphasis added).

This Court reversed. It explained:

> The *Younger* doctrine, which counsels federal-court abstention when there is a pending state proceeding, reflects a strong policy against federal intervention in state judicial processes in the absence of great and immediate irreparable injury to the federal plaintiff. . . . [T]he basic concern — that threat to our federal system posed by displacement of state courts by those of the National Government — is . . . fully applicable to civil proceedings in which important state interests are involved. . . . [T]he State here was a party to the state proceedings, and the temporary removal of a child in a child-abuse context is . . . "in aid of and closely related to criminal statutes."

Id. at 423 (citations omitted) (brackets added by this Court).

In *Moore*, this Court squarely rejected the ruling of the three-judge court that a federal court need not stay its hand if a plaintiff's constitutional claim is "multi-faceted." On the contrary, this Court ruled, "[t]he breadth of a challenge to a complex state statutory scheme has traditionally militated in *favor* of abstention, not *against* it." *Id.* at 427 (emphasis supplied by this Court). In addition, this Court reiterated that the exercise of

> equitable powers is inappropriate if there is an adequate remedy at law. . . . Restated in the abstention context, the federal court should not exert jurisdiction if the plaintiffs "had an *opportunity* to present their federal claims in the state proceedings." The pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings.

Id. at 425 (emphasis supplied by this Court) (citations omitted); *see also id.* at 430 ("the only pertinent inquiry is whether the state proceedings afford an adequate opportunity to raise the constitutional claims").[7]

This Court has not yet decided whether *Younger* abstention applies in the District of Columbia.[8] However, given the independent status of the District of Columbia courts and "Home Rule," this Court should rule that *Younger* does apply. Thus, as this Court ruled in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), the lower federal courts do not have the power to entertain constitutional challenges to District of Columbia judicial decisions. Instead, as a result of the Court Reform Act of 1970, this power may be exercised only by this Court:

> "[L]ower federal courts possess no power whatever to sit in direct review of state court decisions [including those of the District of Columbia courts]." . . . If the constitutional claims presented to a United States District Court are inextricably intertwined with the state court's denial [of a claim] in a judicial proceeding . . ., then the District Court is in essence being called upon to review the state-court decision. This the District Court may not do.

Id. at 483-84 n.16.

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[7] In *Moore*, this Court also rejected the argument that every state decision to take custody of a child reported to be abused or neglected constitutes irreparable harm and thereby removes the *Younger* bar:

> . . . [T]he District Court again inverts traditional abstention logic when it states that because the interests involved are important, abstention is inappropriate. Family relations are a traditional area of state concern. . . . We are unwilling to conclude that state processes are unequal to the task of accommodating the various interests and deciding the constitutional questions that may arise in child-welfare litigation.

442 U.S. at 434-35.

[8] Nor has the D.C. Circuit. *See, e.g., District Properties Associates v. District of Columbia*, 743 F.2d 21, 28 n.4 (D.C. Cir. 1984); *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695, 701 n.7 (D.C. Cir. 1984).

B. Other Circuit Rulings.

As the D.C. Circuit itself has acknowledged, "a number of federal courts have declined to involve themselves in disputes over child custody even when federal constitutional questions were at stake." *Bennett v. Bennett*, 682 F.2d 1039, 1043 n.5 (D.C. Cir. 1982), citing *Bergstrom v. Bergstrom*, 623 F.2d 517 (8th Cir. 1980), and *Huynh Thi Anh v. Levi*, 586 F.2d 625 (6th Cir. 1978).

Bergstrom involved a child-custody dispute following a divorce; the mother had moved to Norway and the father had continued to reside in the United States. While the dispute was pending in a state family law court, the child brought an action in federal court urging that she had a constitutional right to remain in the United States. Although the Eighth Circuit declined to rule that *Younger* required abstention, it reached the same result — dismissal — by ruling that the constitutional issue was not ripe for review. It explained:

> Reexamination of custody arrangements is a matter which belongs exclusively in state court; domestic relations disputes have been traditionally subject to exclusive state jurisdiction. . . . Where a constitutional issue arises out of a custody dispute, and the initial determination involves a reexamination of the custody arrangement, the proper course is to dismiss the case and remand to the state court. . . .
>
> Since the time of the district court's injunction, this entire matter has been litigated in the North Dakota district court. An appeal from that decision is presently pending in the North Dakota Supreme Court. Unlike the record adduced in the federal district court hearing, the state court record was extensively developed and complete: both parents, as well as [the child] . . . appeared and were represented by counsel; the parties presented witnesses who testified and who were cross-examined; and the state court judge personally interviewed [the child] . . ..

623 F.2d at 520-21 (citations and footnotes omitted).

In *Huynh Thi Anh*, the Sixth Circuit ruled that a federal court should abstain from deciding whether a grandmother had a constitutional right to a familial relationship with her grandchildren who had been taken from Vietnam during "Operation Babylift" and for whom adoption petitions had been filed by the childrens' foster parents in a state family law court. In so ruling, the Sixth Circuit explained:

> Traditionally, disputes involving domestic relations including child custody and adoption proceedings, have been thought to be wholly within the province of the state courts. The cases recognize the "local" nature of domestic relations problems, the strong interest of the states in addressing such questions without interference, and the expertise of local agencies and courts in monitoring and resolving domestic relations matters. . . .
>
> The issues of whether the children may be adopted and whether the foster parents may have custody of the children are precisely the issues before the state court. While the case is not strictly the same as in *Younger* . . ., the reasons given by the Supreme Court for declining jurisdiction and deferring to the state court in that case are highly relevant here. Equitable principles favor adjudication of issues in one proceeding rather than in multiple proceedings for the sake of fairness and judicial efficiency. Here, as in *Younger*, the issues could all be resolved in the pending state proceeding. Second, strong considerations of comity lead federal courts to prevent friction with states and avoid interfering in state proceedings, particularly where the federal questions presented are closely intertwined with issues of strong local interest. . . .
>
> Our experience and sense of fairness teach us that this is not a case where the application of a federal *rule*, whether of constitutional or statutory origin, is likely to provide the best answer. We must rely on a judge in a court of family law — with its more flexible standards and with the parties before him and their latest circumstances in mind — to balance the equities and seek compromises that best accommodate the interests of the parties.

586 F.2d at 632-34 (emphasis supplied by court; citation and footnote omitted).

C. The Conflicts.

The D.C. Circuit's ruling that a federal court need not abstain from deciding the custody-related constitutional claims of children who are parties to District family law court proceedings conflicts with *Moore*, *Feldman*, and the decisions of the Sixth and Eighth Circuits. Because these children are parties to proceedings in the family law court of the District where these claims *may be* resolved, this is the forum in which these claims *should be* resolved. Furthermore, the D.C. Circuit's ruling wrongfully results in federal court oversight and interference with the independent judicial system of the District of Columbia. The Family Division resolves custody-related constitutional claims, whether or not denominated as such, and a federal court's intrusion into this area is likely to produce conflicting and less reliable decisions, given a federal court's lack of specialized knowledge and the fact that parents are not parties.

Here, the claims of children who are parties to Family Division proceedings, even if constitutionally based, relate to core Family Division issues. As even the D.C. Circuit and Judge Hogan described them, the primary claims are the failure of the District:

> to provide services to families to prevent the placement of children in foster care, the failure to place those who may not safely remain at home in appropriate foster homes and institutions, the failure to develop case plans for children in foster care, and the failure to move children into a situation of permanency, whether by returning them to their homes or freeing them for adoption.

App. 3a, quoting *LaShawn A.*, *supra*, 762 F. Supp. at 960 (App. 17a).

Such claims, however, are the *raison d'etre* of the Family Division of the Superior Court. The Family Division can, for

example, order services that would enable families to stay together or that would permit a child in the District's foster-care system to return home. In addition, only the Family Division has the authority to terminate parental rights and to permit adoption.

Moore would plainly bar a federal court from entertaining claims that (1) a parent has a constitutional right to services from the District that would prevent the removal of her child from home or permit her child's return or (2) her child, pursuant to a Family Division order, is in an unconstitutionally "inappropriate" foster home. Similar claims by children may also be, and therefore under *Moore* must also be, brought in the Family Division.

Furthermore, Judge Hogan's remedial order expressly and improperly interferes with Family Division proceedings. It provides, *inter alia*:

> Within sixty (60) days of the entry of this Order, the Mayor . . . shall arrange with the Family Division of the Superior Court *for the implementation of a process by which the Family Division shall conduct dispositional hearings as is required by federal law.*

Final Order 40 (emphasis added). Under *Moore* and similar rulings, a federal court is not permitted to supervise dispositional hearings conducted by Family Division judges.[9]

This is precisely what is happening and what will continue to happen unless the D.C. Circuit's decision is reversed. The decisions below have injected an improper federal presence into Family Division proceedings and even into the proceedings of the District's highest court. For example, in the

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[9] Even if this part of the decree (and others) were modified to substitute local law for federal law, this would only exacerbate the comity and federalism problems in this case. The decree would then require a federal court to monitor not only whether the executive branch of the District government is complying with local law, a function that should be reserved to the District of Columbia courts, but also whether the Family Division itself is complying with local law, a function that should be reserved to the District's highest court.

case of Demerick B., one of the named plaintiffs, Judge Hogan, on a limited record and without Demerick B.'s mother before him, characterized Demerick B. as a child "for whom it was recognized early on that return home would be impossible" and criticized the District for not referring him for adoption sooner than it did. App. 47a. By contrast, after Judge Hogan's decision, the District of Columbia Court of Appeals, in an appeal by his natural mother challenging the termination of her parental rights and his adoption, issued an order remanding for further proceedings. See *In re D.B.*, No. 91-357 (D.C. December 13, 1991). These very different approaches to the wisdom of terminating parental rights and adoption illustrate the vast potential for conflict between a federal court seeking to expedite the adoption process and the District of Columbia courts seeking to ensure that custody decisions are made only after the rights and interests of *all* affected persons are considered.

The foregoing also illustrates that, insofar as the principal interests advanced in this case are concerned — the interest in returning a child home and the often conflicting interest in terminating parental rights and placing a child in an adoptive home — the Family Division is a far better forum than a federal court for protecting all relevant interests effectively. The Family Division has the legal authority and the expertise necessary to decide these custody issues, as well as the responsibility and ability to bring *all* interested parties before it. By contrast, in the proceedings before Judge Hogan, the parents of the plaintiff children were neither parties nor participants even though parents have a constitutionally protected interest in maintaining the parental-child relationship. *See, e.g., Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). This is an interest that the courts below did not even consider, but which is an important factor, among many others, in the proceedings in the District of Columbia courts. *See e.g., In re A.W.*, 569 A.2d 168 (D.C. 1990) (upholding by a two-to-one vote decision terminating parental rights even though an adoptive parent had not yet been identified); *In re A.B.E.*, 564 A.2d 751 (D.C. 1989) (reversing decision terminating

parental rights); *In re S.G.*, 581 A.2d 771 (D.C. 1990) (upholding placement with maternal grandmother of child abused by her stepfather and rejecting claim of natural father that he was entitled to custody).[10]

Finally, a federal court's duty to abstain from deciding the constitutional claims of parties to state proceedings where these claims may be heard is not altered on the ground cited by the D.C. Circuit — that the constitutional claims are "multi-faceted." App. 6a, 8a. First, this Court in *Moore* squarely rejected the argument that abstention is not required in child-custody cases raising multi-faceted constitutional claims. Second, the D.C. Circuit's disposition of this case belies its assertion that the constitutional claims of those children who are parties to Family Division proceedings are broader than the matters cognizable by the Family Division. The D.C. Circuit removed from this case all constitutional claims, yet it remanded this case "to the district court, with instructions to fashion an equally comprehensive [remedial] order based entirely on District of Columbia law," subject only to reconsideration of the federal statutory claims in light of *Suter*. App. 13a-14a. The District law governing the principal claims of the children who are parties to Family Division proceedings is the law that is applied by the Family Division in determining whether a child should be removed from home or remain at home with services; where a child should be placed if he may not remain at home; whether parental rights should be terminated; and whether a child may be adopted and, if so, by whom.[11]

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[10] These cases illustrate the complex legal and factual matters that attend decisions concerning what course of action is in the best interests of an abused or neglected child and the difficulties of balancing those interests with the interests of parents. These cases also illustrate how enforcement of the Final Order has a real potential to interfere with the proceedings of the Family Division and the interests of the parties to those proceedings.

[11] In support of its ruling that the District of Columbia courts are not up to the task of deciding plaintiffs' constitutional claims, the D.C. Circuit relied principally upon *Family Division Trial Lawyers v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), and *District Properties Associates v. District*

[Footnote continued on the next page]

In short, insofar as this suit concerns constitutionally based custody-related claims by children who are subject to the protection of the Family Division, it involves claims that are inextricably tied to issues within the Division's purview; seeks to interfere with the Division's proceedings; and is intended to affect the outcome of those proceedings. Abstention is therefore required.[12]

[Footnote continued from the previous page]
of Columbia, 743 F.2d 21 (D.C. Cir. 1984). The two cases are distinguishable. In *Trial Lawyers*, lawyers challenged the constitutionality of the Superior Court's former practice of appointing "counsel to represent indigent parents in neglect proceedings without reimbursement of any kind." 725 F.2d at 697. The lawyers bringing the federal suit, with a single exception the D.C. Circuit found not to be relevant, were not parties to proceedings in the Superior Court; and the attorneys' claims were "so ancillary to arguably related local court [neglect] proceedings that even the local court . . . [found them] disruptive of the resolution of core issues in those proceedings." *Id.* at 703. In *District Properties*, in turn, the D.C. Circuit ruled that *Younger* abstention was not appropriate because "*there are no ongoing proceedings in the local courts in which appellants could raise their federal constitutional claims.*" 743 F.2d at 28 (emphasis supplied by the court).

Here, by contrast, the constitutional claims of the children who are parties to Family Division proceedings lie at the very core of those proceedings.

[12] Two other matters should be noted. First, the D.C. Circuit also suggested (App. 8a) that abstention is not proper because plaintiffs may not bring a class action in the Family Division. This suggestion is wrong. The absence of a procedural device in the Family Division for aggregating individual claims in no way alters the fact that the individual claims may be litigated. Because children who are parties to Family Division proceedings may litigate in that forum the constitutional claims they raised here, their substantive rights are fully protected.

Second, insofar as the federal statutory claims are concerned, the District urged below that abstention was not necessary because *Suter* plainly precludes any private cause of action either by implication or under 42 U.S.C. § 1983. *See infra* at 26-27 n.15. The District also urged that, to the extent that these statutes permit a private cause of action, a federal court should abstain from entertaining any such action.

II. THE RULING THAT A FEDERAL COURT MAY EXERCISE PENDENT JURISDICTION OF LOCAL-LAW CLAIMS INVOLVING CHILD CUSTODY MATTERS CONFLICTS WITH THE DECISIONS OF THIS COURT AND OF OTHER FEDERAL APPELLATE COURTS.

If, as we have explained, a federal court may not decide the constitutional claims of persons who are parties to state family court proceedings where they have an opportunity to raise these claims, it follows *a fortiori* that a federal court may not decide local family-law claims advanced by these persons. The decision of the D.C. Circuit to exercise pendent jurisdiction over such local-law claims is flawed for that reason, and, for the reasons that follow, that decision, as well as the decision to exercise pendent jurisdiction over claims of children who are not parties to Family Division proceedings, is also seriously flawed.

This Court long ago recognized that "[n]eedless decisions of state law should be avoided both as a matter of comity and to promote justice between the parties, by procuring for them a surer-footed reading of applicable law." *United Mine Workers of America v. Gibbs*, *supra*, 383 U.S. at 726. Thus, even though a federal court may have the power to decide pendent state-law claims in a case presenting a non-frivolous federal claim, a federal court may act improperly in exercising that power.[13]

One area in which this Court has ruled that a federal court may not enter is the area of state law governing child-custody decisions. In *Ackenbrandt v. Richards*, *supra*, this Court confirmed the existence of a domestic relations exception to the

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[13] In the past, the D.C. Circuit has recognized that the twin concepts of comity and federalism apply to federal court consideration of pendent District-law claims and thus that a federal court faced with pendent District-law claims, "must give due regard to whether a complaint poses novel and unsettled questions of state law." *Doe v. Board on Professional Responsibility*, 717 F.2d 1424, 1428 (D.C. Cir. 1983), citing *Gibbs*, *supra*, 383 U.S. at 726; *see also Financial General Bankshares, Inc. v. Metzger*, 680 F.2d 768 (D.C. Cir. 1982). In both of these cases, the D.C. Circuit ruled that the district court had abused its discretion in deciding pendent District-law claims.

diversity jurisdiction of the federal courts and set forth the "sound policy" reasons underlying this decision. These reasons apply with equal force here:

> Issuance of decrees of this type not infrequently involves retention of jurisdiction by the court and deployment of social workers to monitor compliance. As a matter of judicial economy, state courts are more eminently suited to work of this type than are federal courts, which lack the close association with state and local government organizations dedicated to handling issues that arise out of conflicts over . . . child custody decrees. Moreover, as a matter of judicial expertise, it makes far more sense to retain the rule that federal courts lack power to issue these types of decrees because of the special proficiency developed by state tribunals over the past century and a half in handling issues that arise in the granting of such decrees.

112 S. Ct. at 2215.

Here, the D.C. Circuit improperly plunged the federal judiciary into the thicket of District of Columbia family law. Acting as if Congress had never enacted the Court Reform Act and ignoring the clear warning signals in *Gibbs* and *Ackenbrandt*, the D.C. Circuit treated the alleged violations of District law as if they were merely lesser included offenses of the alleged violations of federal law.[14] According to the D.C. Circuit, it is proper for a federal court to decide local-law issues in order to avoid having to decide not only constitutional issues but also complex issues of federal statutory construction.[15]

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[14] Indeed, the panel here also ignored the D.C. Circuit's own warnings against federal involvement in child custody cases because inquiries into what actions are in a child's best interests are "within the peculiar province, experience, and competence of the state courts." *Bennett v. Bennett*, 682 F.2d 1039, 1043 (D.C. Cir. 1982).

[15] The proposition that a federal court should decide pendent state claims to avoid construing what it believes are complex federal statutes is a novel and startling principle of judicial decisionmaking. Equally novel and startling is the court's decision that Judge Hogan should construe, once again, the two federal statutes at issue in this case — the Adoption Assistance Act and the Child Abuse Prevention Act — even though his earlier misconstruction of these statutes was properly before the court. [Footnote continued on the next page]

In taking the local-law route, the D.C. Circuit made serious errors. It overlooked the Court Reform Act of 1970 in which Congress conferred exclusive jurisdiction of neglect and adoption cases on the local courts of the District of Columbia. Furthermore, its decision that local law gives plaintiffs the right to bring this action rests on a fundamental misunderstanding of District law and was made without certifying any question to the District of Columbia Court of Appeals. The D.C. Circuit based its decision in part on an isolated provision of a local statute that has never been construed by the District's highest court. Even worse, the D.C. Circuit also failed to read dispositive statutory language and misread the decision of the District's highest court in *Turner v. District of Columbia*, 532 A.2d 662 (D.C. 1987). The D.C. Circuit's pendent jurisdiction ruling thus not only fails to provide a basis for imposing liability but also vividly illustrates why any local-law issue here should be decided in a proper case in the courts of the District of Columbia.

More specifically, the D.C. Circuit's decision is wrong in several critical respects:

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Furthermore, the issues of federal statutory construction are not complex. *In Suter v. Artist M.*, 112 S. Ct. 1360, 1363 (1992), this Court held that "the Adoption Assistance and Child Welfare Act of 1980, . . . 42 U.S.C. §§ 620-628, 670-679a," "does not create an enforceable right on behalf" of children. *See also In re D.G.*, 583 A.2d 160 (D.C. 1990) (correctly anticipating *Suter*). In *Suter*, the Court ruled that the Adoption Assistance Act is merely a federal grant program to the states and does not confer on children in foster care any private cause of action or create a right or privilege within the meaning of 42 U.S.C. § 1983.

In the District's view, *Suter* forecloses any federal statutory cause of action either by children in the District's foster-care system or by children not in the District's foster-care system for whom there have been reports of neglect or abuse. Thus, *Suter* plainly forecloses any private right to enforce the Adoption Assistance Act. In addition, *Suter* requires reversal of the decision that the Abuse Prevention Act confers rights on children who are not in the District's foster-care system but who have been the subject of a report of neglect or abuse. The Abuse Prevention Act, like the Adoption Assistance Act, is merely a federal grant program to enable states to improve efforts to protect neglected and abused children.

1. It ignores the Court Reform Act in which Congress vested "exclusive jurisdiction" of neglect and adoption proceedings in the Family Division. See D.C. Code § 11-1101(9) & (13) (1989 repl.).

2. It misreads the Youth Residential Facilities Licensure Act of 1986 and wrongly concludes that this action may be based on that statute. The mandamus provision (D.C. Code § 3-808(d)(1)) cited by the court (App. 12a) is qualified by § 3-808(d)(2), as follows: "Any person bringing an action under paragraph (1) of this subsection shall give the named defendant(s) at least 5 days advance notice . . . before the action is filed in court." The record here does not indicate that notice was given before this action was filed, and, as the language of § 3-808(d)(2) and *Campbell v. District of Columbia*, 568 A.2d 1076 (D.C. 1990), make clear, the filing of a lawsuit does not constitute statutory notice. *See also Brown v. United States*, 742 F.2d 1498, 1508 (D.C. Cir. 1984) (*en banc*) (compliance with statutory notice provision is a condition precedent to accrual of rights against the District), *cert. denied*, 471 U.S. 1073 (1985).

3. It misreads the decision of the District's highest court in *Turner*. The District's Prevention of Child Abuse and Neglect Act of 1977, as construed in *Turner*, does not create by implication a private right of action. Any cause of action a person may have against the District for tortious injury arises from the common law. When such a common law action is brought and when it is determined that the action is based on the District's failure to deliver public services, the action is barred by the District's public duty doctrine unless there is a special relationship between the tort victim and the District.[16] In *Turner*, the District's highest court merely held that the Abuse and Neglect Act creates a special relationship between the District and a child reported to be abused and thus precludes the District from raising the

[16] *See, e.g., Wanzer v. District of Columbia*, 580 A.2d 127 (D.C. 1990) (ambulance services); *Platt v. District of Columbia*, 467 A.2d 149 (D.C. 1983) (fire inspection services); *Warren v. District of Columbia*, 444 A.2d 1 (D.C. 1981) (*en banc*) (police services).

public duty doctrine as a bar to a tort claim otherwise cognizable under the common law. Thus, *Turner* merely permits a child to hold the District responsible only when (1) the child suffers an injury cognizable under the common law, such as wrongful death, which may fairly be said to have been negligently caused by District employees and (2) the child has a special relationship with the District.

In short, in reaching out to decide this case on District-law grounds, the D.C. Circuit wrongfully ignored *Gibbs* and *Ackenbrandt*; overlooked Congress' grant of exclusive jurisdiction to the Family Division of child neglect and adoption matters; and erred in interpreting local law.

CONCLUSION

The District is acutely aware that its child-neglect and foster-care system must be improved to ensure the well-being of its most vulnerable children. However, a federal court may not create an auxiliary federal Family Division in the apparent belief that it can do a better job than the combined forces of the District of Columbia government in allocating scarce resources and in interpreting and enforcing local law. Before a federal court embarks on a journey into one of the central functions of a local government, it ought to have a federal reason for doing so; its journey should be limited to its federal concerns; and it should not intrude into areas in which local courts are exercising their authority, including their authority to decide constitutional claims.

This Court should therefore review the decision of the D.C. Circuit. This Court should rule that Judge Hogan's sweeping order regulating the District's child-neglect and foster-care system cannot be upheld solely on District-law grounds. This Court should also rule that the principles of *Younger* and its progeny extend to the District of Columbia courts and require children who are parties to local family-court proceedings to litigate in that forum their constitutionally based custody claims.[17]

[17] There is one other important consideration. One result of the D.C. Circuit's decision may be to require the financially pressed District to [Footnote continued on the next page]

Respectfully submitted,

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[Footnote continued from the previous page]
pay attorney's fees to plaintiffs' counsel for this entire litigation even though plaintiffs have prevailed (mistakenly) only on local-law grounds. This potential fee award, and future potential fee awards for monitoring the remedial decree, are also compelling reasons for this Court to review the decision below.

Furthermore, as we have explained, Judge Hogan's pre-*Suter* federal statutory rulings do not survive *Suter*. *See supra* at 26-27 n.15. Finally, despite the flaws in the District's child-welfare system set forth in Judge Hogan's opinion, that opinion does not set forth findings of fact or evidence that approximate the allegations that have persuaded other federal courts to find a potential due process violation. *See, e.g., Yvonne L. ex rel. Lewis v. New Mexico Dep't of Human Services*, 959 F.2d 883, 893 (10th Cir. 1992) (foster-care child who was allegedly raped in foster-care facility has constitutional cause of action if she can establish that officials placed her in facility either knowing or suspecting that it was dangerous); *K.H. ex rel. Murphy v. Morgan*, 914 F.2d 846 (7th Cir. 1990) (Posner, J.) (placement of child with foster parent known to be, or suspected of being, a child abuser violates due process, but seemingly mindless shuttle of child from one foster home to another does not). *Compare Child v. Beame*, 412 F. Supp. 593 (S.D.N.Y. 1976) (Weinfeld, J.) (dismissing complaint alleging that state violated Constitution by deliberately pursuing policy of keeping children in foster care rather than seeking out adoptive homes).

Supreme Court, U.S.
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93-724

No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued November 4, 1992 Decided April 16, 1993

No. 91-7159

LaShawn A., by her next friend, Evelyn Moore, *et al.*,
Appellees

v.

Sharon Pratt Kelly, *et al.*, Appellants

Appeal from the United States District Court
for the District of Columbia
Civil Action No. 89-1754

Beverly J. Burke, Deputy Corporation Counsel, for appellants. *John Payton*, Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Donna M. Murasky*, Assistant Corporation Counsel, were on the brief for appellants.

Marcia Robinson Lowry, with whom *Christopher J. Dunn*, *Elizabeth Symonds*, and *Arthur B. Spitzer* were on the brief, for appellees.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before MIKVA, *Chief Judge*; SENTELLE and RANDOLPH, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* MIKVA.

MIKVA, *Chief Judge*: This is a review of a decision by the district court in favor of a group of unfortunate children who brought a class action suit for injunctive relief against various officials of the District of Columbia. The plaintiffs brought the class action on behalf of children who are in foster care under the supervision of the District of Columbia Department of Human Services ("DHS"), as well as children who are reported to be abused or neglected but are not yet in the care of the DHS.

The children attacked a child-welfare system which they alleged is characterized by ineptness and indifference, inordinate caseloads and insufficient funds. The district court found that, because of the appalling manner in which the system is managed, children remain subject to continuing abuse and neglect at the hands of heartless parents and guardians, even after the DHS has received reports of their predicaments. The court also found that youngsters who have been taken into the custody of the District's foster-care system languish in inappropriate placements, with scarce hope of returning to their families or being adopted. The court held that the District of Columbia's treatment of the children violated the Constitution and federal and local statutes.

After trial, the parties negotiated a remedial order that seeks to ease the plight of children who depend on the DHS for protection and for the opportunity to live and grow in a stable and nurturing environment. In the remedial order, the District of Columbia expressly reserved the right to appeal the district court's judgment assessing liability against it. The District's appeal from this judgment raises some complex constitutional and federal statutory issues. Because District of Columbia law is an independent and sufficient basis to support the district court's decision, however, we need not reach these issues in order to uphold the district court's resolution of this case.

I. BACKGROUND

It is not necessary to recount at length the complex background of this case, nor to recapitulate the extensive list of allegations against the District officials that the district court found to be based in fact. For the details as to these matters, we refer to Judge Thomas F. Hogan's clear and comprehensive discussion in the opinion below. *LaShawn A. v. Dixon*, 762 F. Supp. 959, 961–87 (D.D.C. 1991). Suffice it to say that the district court found that the District of Columbia Department of Human Services ("DHS"), the agency entrusted with the care of foster children and abused and neglected children, has consistently evaded numerous responsibilities placed on it by local and federal statutes. Among the agency's transgressions are:

> [T]he failure of the DHS to initiate timely investigations into reports of abuse or neglect, the failure to provide services to families to prevent the placement of children in foster care, the failure to place those who may not safely remain at home in appropriate foster homes and institutions, the failure to develop case plans for children in foster care, and the failure to move children into a situation of permanency, whether by returning them to their homes or freeing them for adoption.

LaShawn A., 762 F. Supp. at 960.

The district court held, as to the children already enmeshed in the foster-care system, that the practices of the DHS deprived them of their due process rights under the Fifth Amendment to the United States Constitution. The court also found that the challenged actions and non-actions of the DHS violated two federal statutes: the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620–627 and §§ 670–79, and the Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101–5106. The court held the defendants liable under 42 U.S.C. § 1983 for both the constitutional and federal statutory violations.

The children also raised pendent claims that the defendants had violated the District of Columbia's statutory and regula-

tory law, namely the Prevention of Child Abuse and Neglect Act of 1977, D.C. Code Ann. §§ 2-1351 to -1357, §§ 6-2101 to -2107, §§ 6-2121 to -2127, and §§ 16-2351 to -2365 ("Abuse and Neglect Act"); the Youth Residential Facilities Licensure Act of 1986, D.C. Code Ann. §§ 3-801 to -808 ("Licensure Act"); and the Child and Family Services Division ("CFSD") Manual of Operations (September 1985). The district court found that the defendants had violated these acts and regulations, but it did not hold that the children possessed an explicit or implied private cause of action under District law to enforce these statutes. Instead, it held that the District's laws conferred constitutionally protected liberty and property interests on the children, the deprivation of which, without due process, was actionable under § 1983.

On appeal, the District officials assert that the district court erred in finding that the administration of the city's child-welfare and foster-care system violated the due process clause of the Fifth Amendment. They further contend that *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), which the Supreme Court decided after the district court decided the present case, forecloses any federal statutory cause of action. As we will explain, it is not necessary for us to confront these constitutional and federal statutory issues, for the district court judgment is completely supportable on the grounds of local law.

II. ANALYSIS

A. Abstention

As an initial matter, we must address the District officials' contention that under principles of *Younger v. Harris*, 401 U.S. 37 (1971), the district court should have abstained from deciding a large portion of this case. Appellants assert that *Younger* applies as to children within the foster-care system because these children are parties to ongoing proceedings in the Family Division of the Superior Court of the District of Columbia where their claims could have been resolved. (Appellees do not urge *Younger* abstention as to the claims of children who are reported to be abused or neglected but who

are not yet in foster care, because these children are not yet parties to Family Division proceedings.) This Court has never decided whether the District of Columbia is a state for *Younger* abstention purposes. Instead, every time the question has arisen, we have assumed that the doctrine applies to the District and nonetheless determined, in light of the facts of each particular case, that *Younger* abstention has not been appropriate. *See, e.g., District Properties Assocs. v. Dist. of Columbia*, 743 F.2d 21, 28 n. 4 (D.C. Cir. 1984); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 701 n. 7 (D.C. Cir. 1984). In the present case, we again find it unnecessary to reach the issue, because *Younger* abstention would not be required here even if the doctrine applied to the District with full force.

In *Younger* and its progeny, the Supreme Court has established that federal courts may not interfere with pending state judicial or administrative proceedings. Although the Supreme Court has extended *Younger* abstention well beyond its original application to pending state criminal proceedings, the Court has never abandoned the core principle that the doctrine is applicable only "if the [federal] plaintiffs 'had an *opportunity* to present their federal claims in the state proceedings.'" *Moore v. Sims*, 442 U.S. 415, 425 (1979) (quoting *Juidice v. Vail*, 430 U.S. 327, 337 (1977) (emphasis in original)). The notions of comity underlying *Younger* abstention do not compel federal courts to refrain from hearing federal statutory and constitutional claims when the pending state proceeding is an inadequate or inappropriate forum for pursuing these claims.

This Court has previously applied this principle in a case concerning the Family Division of the D.C. Superior Court. *Family Div. Trial Lawyers of Superior Court–D.C., Inc. v. Moultrie*, 725 F.2d 695 (D.C. Cir. 1984), involved the constitutional claims of three attorneys who regularly requested assignment of cases in the Family Division. In federal district court, the attorneys unsuccessfully challenged the practice by which the D.C. Superior Court appointed counsel to represent indigent parents in neglect proceedings without reimbursement. They appealed the adverse decision to this

Court. Before this Court, the appellees argued that the district court should have abstained from deciding the merits of the appellants' claims, because these claims could have been raised and adequately dealt with in the individual neglect cases in which the appellants were counsel.

This Court rejected the appellees' abstention argument. It questioned "the need or wisdom of extending *Younger* to all constitutional claims that *might* be adjudicated in state as well as federal courts." 725 F.2d 695, 702 (D.C. Cir. 1984). Instead, the court focused on whether the federal plaintiffs were "parties to any pending suit in the local courts in which their constitutional challenges could *naturally* be resolved." *Id.* at 702 (emphasis added). The panel observed that "the individual neglect cases in which the appellants are counsel are questionable vehicles at best for raising their constitutional claims." *Id.* at 703. Consequently, it concluded that *Younger* abstention was not applicable.

Proceedings in the Family Division are an equally questionable vehicle for adjudicating the claims raised in the present case. There are three types of Family Division proceedings that may be "pending" for a child entangled in the District of Columbia's foster-care system: (1) a "neglect proceeding" adjudicating a neglect petition filed by the Corporation Counsel against the child's parents, (2) periodic review hearings, and (3) proceedings adjudicating motions to terminate parental rights. None of these proceedings is an appropriate forum for this multi-faceted class-action challenge to the District of Columbia's administration of its entire foster-care system.

Neglect proceedings are designed to focus on the special problems surrounding the neglect or abuse of a child by his or her parent, guardian, or custodian. The Family Division of the D.C. Superior Court has recognized that these proceedings are not suitable arenas in which to grapple with broad issues external to the parent-child relationship:

> By their very nature neglect proceedings contemplate issues centering on the care of a child by his or her parent. If need be "related matters involving the same

> family or household" can be consolidated. [D.C. Superior Court Rules Governing Neglect Proceedings Rule 2 and 3(b).] Anything broader is inconsistent with the nature of the proceedings.

In the Matters of N.P. and L.W., Nos. 404–79, 418–79 (D.C.Super.Ct. June 14, 1982), slip. op. at 2–3, *quoted in Family Div.*, 725 F.2d at 703.

The other two types of proceedings that are pending for some of the children—review hearings and termination proceedings—are even less suitable arenas in which to present the claims the children advance in this case. The Family Division is required to provide each child in the foster-care system with a review hearing either every six months or every year, depending on the child's age and the amount of time he or she has been within the system. D.C. Code Ann. § 16–2323(a). The review hearing is no broader in scope than the neglect proceeding. It is clearly intended merely to reassess periodically the disposition of the child.

The Family Division has explicitly rejected the use of review hearings to adjudge claims requesting broad-based injunctive relief based on federal law. In *In re Brim*, No. 489–80 (D.C. Super. Ct. July 20, 1984), the Family Division denied a motion by two children for injunctive relief against the D.C. Department of Human Services for the Department's alleged mishandling of Social Security disability payments it collected on the children's behalf. The court noted:

> This motion—with the full panoply of remedies requested (such as an accounting, declaratory relief requiring promulgation of rules and regulations, establishment of trust funds, and a permanent injunction)—is simply not appropriately heard within the context of a review, pursuant to 16 D.C. Code 2323, to monitor the post-dispositional welfare of a neglected child . . . [T]hese issues are properly raised in federal district court.

Id., slip op. at 2.

The only other proceeding available to children in the foster-care system is the termination hearing. *See* D.C. Code

Ann. §§ 16–2358–59. This proceeding, however, has an even more limited function than the neglect proceeding and review hearing. A termination hearing is held in response to a motion by a child (through counsel), or by the District of Columbia, to terminate the parental rights of the child's parents, guardians, or custodians. D.C. Code Ann. § 16–2354. The hearing is manifestly not intended to address subjects other than the cessation of parental rights, and the children's claims in this case are well outside its scope.

In sum, there was no pending judicial proceeding in the District of Columbia which could have served as an adequate forum for the class of children in this case to present its multifaceted request for broad-based injunctive relief based on the Constitution and on federal and local statutory law. This holding squares with our decision in *District Properties Assocs. v. Dist. of Columbia*, 743 F.2d 21 (D.C. Cir. 1984). In *District Properties*, local landlords brought a class action suit broadly challenging, on constitutional and federal statutory grounds, the practices and procedures of the District of Columbia agency responsible for administering the District's rent control laws. They pursued their case in U.S. District Court, despite ongoing administrative and judicial proceedings in the District of Columbia. This Court reversed the district court's use of *Younger* abstention to bar the action. In language strikingly relevant to the present case, we stated:

> [T]he only possible ground for *Younger* dismissal in this case would be if [the ongoing District of Columbia proceeding] was the kind of local enforcement proceeding in which appellants could have had a full and fair opportunity to present their federal claims. But . . . appellants' claims are in a number of respects considerably broader than the claims they were able to assert in the proceedings in local courts or before the [Rental Accommodations Office]. And the relief they seek in this case is far broader than that which the local court could have granted in the administrative review proceeding . . . . There being no pending state enforcement proceedings that would have afforded appellants a full and fair opportunity

> to litigate their constitutional claims, the predicate for *Younger* abstention was simply absent in this case.

Id. at 28. For the same reasons, we refuse to hold that the district court should have abstained from deciding the present case. We proceed to the merits.

B. Challenges to the Child-Welfare and Foster-Care System

The district court adjudged the defendants liable "under 42 U.S.C. § 1983 for violating the federal and local statutory rights of all of the children in the plaintiff class and for violating the constitutional rights of those plaintiffs in the District of Columbia's foster care custody." *LaShawn A. v. Dixon*, 762 F. Supp. 959, 998 (D.D.C. 1991). Appellants attack the judgment so far as it rests on federal statutory rights. They argue that the Supreme Court's opinion in *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), decided after the district court issued its ruling in *LaShawn*, renders the federal statutes at issue unenforceable under 42 U.S.C. § 1983. Appellants also challenge the constitutional basis of the district court opinion.

It is not necessary to reach the complex constitutional and federal statutory issues in this case. The District of Columbia's statutes and regulations provide a scheme for the protection and care of foster children, and children reported to be abused or neglected, that is equally as comprehensive as that provided by the federal statutes and is appropriately before us under our pendent jurisdiction.

As outlined by the district court, the obligations of the District of Columbia Department of Human Services under the Abuse and Neglect Act, the Licensure Act, and the CFSD Manual of Operations parallel almost precisely the requirements contained in the relevant federal laws. Every claim supported by federal law is also supported by District law. *LaShawn A. v. Dixon*, 762 F. Supp. at 961–64. The DHS has violated District law as well as federal law by failing, for example, to initiate timely investigations into reports of abuse or neglect, to provide services to families in order to prevent the placement of children in foster care, to place those who

may not safely remain at home in appropriate foster homes and institutions, to develop case plans for children in foster care, and to move children into a situation of permanency.

As the district court framed its decision, local law did not provide an entirely independent ground for the judgment, because the court did not find that the local statutes themselves provided the children with an explicit or implied private right of action. Instead, the district court apparently decided that the District of Columbia's statutes and policies create constitutionally protected liberty and property interests for those children in the District's foster-care custody. "To the extent these statutes and regulations confer benefits upon the plaintiffs in the District's foster care, the deprivation of those benefits takes on constitutional dimensions." *LaShawn*, 762 F. Supp. at 993. The children thus had a cause of action under § 1983.

If, however, we determine that the district court's judgment can be supported entirely by reference to the law of the District of Columbia, as appellees argue, we need not enter the § 1983 thicket at all. The fact that the district court itself did not rest its decision on this basis is of no concern, for "[t]he prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970).

We find that the District statutes create a private cause of action for children in foster care and for children reported to have been abused or neglected but not yet in the District's custody. As for the latter group, this matter was conclusively settled by the District of Columbia Court of Appeals in *Turner v. District of Columbia*, 532 A.2d 662 (D.C.App. 1987). In that case, a mother brought suit against the District of Columbia on behalf of her children for the city's failure to remove the children from their abusive father's home. The District of Columbia Court of Appeals found that the Abuse and Neglect Act provides a private remedy against the Dis-

trict for the special class of abused and neglected children protected by the statute:

> With respect to the District of Columbia . . . we hold that when [the Child Protective Services Division] received a report that the two Roddy children, who were specifically and individually identified, were being abused by their father, [the Abuse and Neglect Act] created a special relationship between the District and the two children. From that moment on, the District had a duty to take certain steps prescribed by the Act for the protection of those children. The District's breach of that duty is actionable under the special duty exception to the general rule [that the government's general duty to the citizenry at large is not enforceable by a particular individual].

Id. at 675.

Turner establishes that the children in the present case who are reported to be abused or neglected but who are not yet in the District's custody have a private right of action under the District's Abuse and Neglect Act. It therefore seems self-evident that this Act (which regulates the District's foster-care system as well as its child-abuse-response system) also creates privately enforceable rights for those children actually in the District's custody. It is generally recognized that the state owes a greater duty toward people in its custody than toward people still in the care of private actors. Indeed, in assessing duties imposed on the state by the United States Constitution (as opposed to duties imposed by state statutes), the Supreme Court has held that the state has a constitutional duty to assume responsibility for the safety and well-being of a person *only* when the state takes that person into its custody. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199–201 (1989).

It would strain logic to conclude that the District, through the Abuse and Neglect Act, has assumed a duty on behalf of children still in the private sphere, but not on behalf of those youngsters who are in its custody. We therefore hold that the Abuse and Neglect Act creates a private right of action for children in the foster-care system.

There is an additional basis in District law for the right of the children in foster care to sue to enforce the statutes at issue. The other District of Columbia statute relied on by appellees, the Youth Residential Facilities Licensure Act, explicitly provides these children with a private cause of action. This act regulates Youth Residential Facilities, which it defines to "include, but not necessarily be limited to, foster homes, youth shelters, runaway shelters, emergency care facilities, youth group homes, supervised apartments, and residential treatment centers." D.C.Code Ann. § 3–801(9)(B).

Unquestionably, every child entangled in the D.C. foster-care system is situated in a facility covered by this provision. The act goes on to grant every resident of one of these facilities a private right of action:

> Notwithstanding the availability of any other remedy, a resident, any person acting on or in behalf of a resident, or the licensee or administrator of a facility may bring an action in court for mandamus to order the Mayor, a District government agency, or the youth residential monitoring committee to comply with this chapter, a rule issued pursuant to this chapter, *or any other District law relevant to the operation of the facility or the care of its residents.*

D.C.Code Ann. § 3–808(d)(1) (emphasis added).

In other words, the Licensure Act permits children in foster care to sue to enforce not only the requirements of the Licensure Act itself, but also all of the provisions of the Abuse and Neglect Act related to "the care" of these children. This broad language encompasses all the provisions that the appellants are alleged to have violated.

In sum, under District of Columbia law, every member of the appellee class had a private right of action to enforce the obligations imposed on the DHS by local statutes and regulations. Moreover, these statutes provide an independent basis for supporting the district court's judgment. We therefore affirm the district court without addressing the federal statu-

tory and constitutional claims. Our authority to decide the case entirely on pendent state grounds is incontrovertible. The Supreme Court has held that "where two distinct grounds in support of a single cause of action are alleged, one only of which presents a federal question ... the federal court, even though the federal ground be not established, may nevertheless retain and dispose of the case upon the non-federal ground." *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 722 (1966) (quoting *Hurn v. Oursler*, 289 U.S. 238, 246 (1933)).

No challenge has been raised to the district court's certification of the class. In any event, such certification was proper in relation to the pendent claims, as well as the federal claims. The children could not have brought their District law claims as a class action in the Family Division. *See* Rules Governing Neglect Proceedings Rule 1(b) (excluding from list of rules applicable to neglect proceedings the rule providing for class actions). They clearly could, however, have brought these claims as a class action in the District of Columbia Superior Court. *See* D.C. SUPER. CT. R. CIV. P. 23. It thus is not necessary for us to consider the issue of whether the federal district court could have entertained the pendent claims as a class action if the procedure had in fact been unavailable to the children in the District of Columbia courts.

III. CONCLUSION

Because the district court's judgment is independently supportable by District of Columbia law, we affirm the court's decision in favor of the children in this case. It appears that each provision of the remedial order reflects the requirements of District of Columbia statutes and regulations, as well as of federal statutes. Nevertheless, because the order was drafted to conform with federal as well as with District law, there are scattered references in the order to federal law that are inappropriate in light of our confirmation of the decision entirely on the basis of local law.

We therefore remand to the district court, with instructions to fashion an equally comprehensive order based entirely on

District of Columbia law, if possible. If there are any portions of the consent decree that depend entirely on a federal statute, the district court should consider the impact of *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), on those provisions before it includes them in the revised consent decree.

It is so ordered.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 89-1754

LASHAWN A., *et al.*,
Plaintiffs.

v.

SHARON PRATT DIXON, *et al.*,
Defendants.

ORDER

In accordance with the Memorandum Opinion issued herewith and for the reasons set forth therein, it is this 18th day of April, 1991,

ORDERED that the defendants are hereby adjudged liable under 42 U.S.C. § 1983 for violating the federal and local statutory rights of all of the children in the plaintiff class and for violating the constitutional rights of those plaintiffs in the District of Columbia's foster care custody; and it is

FURTHER ORDERED that there shall be a status conference on May 10, 1991, at 9:15 a.m., in Courtroom 9, for the purpose of discussing the relief phase of this case. Prior to the status conference, the parties shall make a good faith effort to prepare a joint proposed schedule for resolving the final phase of this case.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

FILED APRIL 18, 1991

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 89-1754

LASHAWN A., *et al.*,
Plaintiffs,

v.

SHARON PRATT DIXON, *et al.*,
Defendants.

MEMORANDUM OPINION

This is a class action brought on behalf of children who are in foster care under the supervision of the District of Columbia Department of Human Services (DHS)[1] and children who, although not yet in the care of the DHS, are known to the department because of reported abuse or neglect.[2] It is a case about thousands of children who, due to family financial problems, psychological problems, and substance abuse problems, among other things, rely on the District to provide them with food, shelter, and day-to-day care. It is about beleaguered city employees trying their best to provide these necessities while plagued with excessive

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[1] The DHS is the District's umbrella social services agency. Within it are three commissions, including the Commission on Social Services (CSS). Within the CSS are five administrations, including the Family Services Administration (FSA). Within the FSA are three divisions, including the Child and Family Services Division (CFSD), which has the primary responsibility for the implementation and administration of the child welfare system within the District, including the foster care system.

[2] Because several of the original defendants, including former mayor Marion Barry, no longer hold office in the District of Columbia government, the Court is *sua sponte* substituting the current officials, including Mayor Sharon Pratt Dixon, as defendants.

caseloads, staff shortages, and budgetary constraints. It is about the failures of an ineptly managed child welfare system, the indifference of the administration of the former mayor of the District of Columbia, Marion Barry, and the resultant tragedies for District children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.

The complaint in this case alleges both statutory and constitutional violations in the administration of the District's foster care system. These allegations include the failure of the DHS to initiate timely investigations into reports of abuse or neglect, the failure to provide services to families to prevent the placement of children in foster care, the failure to place those who may not safely remain at home in appropriate foster homes and institutions, the failure to develop case plans for children in foster care, and the failure to move children into a situation of permanency, whether by returning them to their homes or freeing them for adoption.

In over two weeks of trial, this Court heard testimony about the system's deficiencies from a vast array of witnesses, including experts in child welfare and child psychiatry, social workers and managers at the DHS, foster and adoptive parents, and the parent of two children who spent several years in the District's custody. The Court has before it over a thousand District admissions confirming many of the plaintiff class' allegations. The inescapable conclusion is that the foster care system operated by the DHS does not comply with federal law, District law, or, for those plaintiffs in the District's foster care, the United States Constitution. Defense counsel has argued that public institutions cannot solve the problems brought about by poverty, neglect, and abuse until society addresses their causes. Plaintiffs have not asked for a "perfect world," however, they merely request compliance with statutory and constitutional requirements and they ask not to be harmed while in the District's custody.

Mindful of the uncomfortable position in which the Court is placed by entertaining such a challenge to local government action, it is nevertheless compelled by the evidence to enter a judgment of liability against the defendant officials.[3] The Court shall defer ordering specific injunctive relief until after further briefing and argument by the parties.

I.

THE STATUTORY FRAMEWORK

Plaintiffs' complaint alleges that the District's practices in administering the city's foster care system violate numerous provisions of federal and District statutes. The federal statutes allegedly violated are the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 516 (June 17, 1980) (codified as amended at 42 U.S.C. §§ 620-627 and §§ 670-679) (Adoption Assistance Act) and the Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (January 31, 1974) (codified as amended at 42 U.S.C. §§5101-5106) (Abuse Prevention Act). The District statutes alleqedly violated are The Prevention of Child Abuse and Neglect Act of 1977, D.C. Law 2-22 (Sept. 23, 1977) (codified as amended at D.C. Code Ann. § 2-1351 to -1357, § 6-2101 to -2107, § 6-2121 to -2127, and § 16-2351 to -2365) (Abuse and Neglect Act) and the Youth Residential Facilities Licensure Act of 1986, D.C. Law 6-139 (Aug. 13, 1986) (codified as amended at D.C. Code Ann. § 3-801 to -808) (Licensure Act). Plaintiffs' complaint also alleges violations of the Child and Family Services Division (CFSD) Manual of Operations (September 1985) and reasonable professional child welfare standards.

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[3] The defendants in this action, all of whom are sued in their official capacities, are Sharon Pratt Dixon, mayor of the District of Columbia; Vincent Gray, director of the Department of Human Services; Barbara Burke-Tatum, commissioner of the Commission on Social Services; Elizabeth Parker, acting administrator of the Family Services Administration; and Evelyn Andrews, chief of the Child and Family Services Division.

A. Abuse and Neglect

The federal Abuse Prevention Act and the District's Abuse and Neglect Act both deal with the investigation of reports of abuse and neglect and the provision of services to families for whom reports are substantiated. The District law establishes a 24-hour intake unit within the CFSD, the function of which is to receive reports of abuse and neglect and respond with investigations and emergency services. D.C. Code Ann. § 6-2122(e). The federal law requires "prompt" investigations, 42 U.S.C. § 5106a(b)(2), whereas the District law requires investigations "within 24 hours of the receipt of the report." D.C. Code Ann. § 6-2102(b). The purpose of the investigations, according to District law, is to determine the nature and extent of the abuse or neglect, the person responsible for the abuse or neglect, the conditions in the home, and whether the health or safety of the children in the home are in jeopardy. D.C. Code Ann. § 6-2104. Both federal and District law require the DHS to take whatever steps are necessary to protect the health and welfare of a child for whom a report has been made. These steps may include providing emergency services so that the child may remain in the home, or removing the child and placing him or her in temporary care if the provision of services could not adequately protect the child. 42 U.S.C. § 5106a(b)(2) & (b)(3); D.C. Code Ann. § 6-2105 & 6-2124. Federal law requires "reasonable efforts" to prevent the removal of a child from the home or to return the child to the home if removal is necessary. Adoption Assistance Act, 42 U.S.C. § 671(15). District law similarly requires the CFSD to develop a plan for providing services to prevent the child's removal from the home or facilitate the child's return to the home if removal is unavoidable. D.C. Code Ann. § 6-2107. Finally, District law requires that if the child is removed from the home as a result of the investigation, within 90 days of removal the DHS shall either return the child to the home or request the filing of a neglect petition in the Family

Division of the Superior Court of the District of Columbia. D.C. Code Ann. § 6-2123.

B. Continuing Services

The federal Adoption Assistance Act and the District's Abuse and Neglect Act include provisions on placing children in foster care, preparing case plans, providing continuing services to children and their natural and foster parents, periodically reviewing the necessity and appropriateness of placements, recruiting adoptive families, and maintaining a system that comports with professional standards.

1. Placements

There are five ways a child may come into the custody of the DHS. The first is through voluntary placement, by which the child's parent or guardian voluntarily requests a temporary placement not to exceed 90 days. Before a child is taken into placement, a variety of in-home services directed at maintaining the child in the home must be offered or considered. CFSD Manual of Operations at § 601.1. Other methods of bringing a child into the custody of the DHS are through voluntary relinquishment of parental rights, *see id.* at § 601.2, temporary shelter care while a court action is pending, *see id.* at § 601.3, protective custody when a child has been left alone or with inadequate supervision, *see id.* at § 601.4, and police hold when a law enforcement officer has reason to believe the child is in immediate danger and removal is necessary. *See id.* § 601.5.

With respect to voluntary placements, also referred to as "emergency care" by the DHS officials, District law requires the CFSD to return the child to the home or request the filing of a neglect petition in the Family Division of the District of Columbia Superior Court within 90 days of placement. D.C. Code Ann. § 6-2123(2). Federal law requires return to the home within 180 days unless there has been a judicial determination that placement is in the best interests of the child. 42 U.S.C. § 672(e).

Federal law requires that children for whom placement is necessary be placed in "the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child." 42 U.S.C. § 675(5)(A). *See also* CFSD Manual of Operations at § 602.5(a). Additionally, federal law requires that all foster homes and institutions receiving federal funds meet standards "reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights." 42 U.S.C. § 671(10).

2. Case Plans

Federal regulations require social workers to prepare written case plans within 60 days of the assumption of responsibility for a child. 45 C.F.R. § 1356.21(d)(2). Similarly, District law provides that case plans be prepared "as soon as possible" for children for whom there has been a substantiated report of abuse or neglect. D.C. Code Ann. §6-2107(b). This requirement is expanded upon in the CFSD Manual of Operations, which mandates a case plan within 45 days of the child's entry into care or within 30 days if the child has been voluntarily placed in care. CFSD Manual of Operations at § 401.2(a). To be in compliance with federal law, a case plan must contain a description of the home or institution in which the child is to be placed and a discussion of the appropriateness of such a placement. Additionally, the plan must set forth the agency's intentions for carrying out the voluntary placement agreement or judicial determination that resulted in the child's placement in foster care.[4] The plan

[4] Under the Adoption Assistance Act, states receiving federal monies under the Act must make foster care maintenance payments on behalf of children who are removed from the home as a result of either a voluntary placement agreement entered into by the child's parent or legal guardian or a judicial determination that remaining in the home would be contrary to the child's welfare and reasonable efforts to prevent placement have been made. 42 U.S.C. § 672(2).

must also include a program for providing services to the child and his or her natural and foster parents, with the goal of either returning the child to the home or permanently placing the child. The plan must further detail the services necessary to address the child's needs while in foster care and must discuss the appropriateness of the services that have been provided. Finally, the plan must include the health and educational records of the child, to the extent those records are available and accessible. 42 U.S.C. § 675(1).

The District's Abuse and Neglect Act requires similar information to be included in case plans and requires specific arrangements for the management of each case for which protective services are required. D.C. Code Ann. § 6-2107(b). The CFSD Manual of Operations is more specific, requiring case plans to include the reasons for placement, the goal for the child and the date it is to be achieved, the reasons for the choice of the goal, and the changes necessary to achieve the goal. CFSD Manual of Operations at § 401.2(h). Case plans must also include a visitation schedule specifying who will visit, how frequently visits will take place, where the visits will occur, and whether any conditions of supervision will apply. *Id.*[5]

3. Providing Services

The Adoption Assistance Act requires agencies to provide "proper care" to children in their custody and to provide services intended to facilitate the return of the child to the home or to place the child in a permanent family. 42 U.S.C. §675(1)

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[5] The District's laws governing proceedings in the Family Division of the District of Columbia Superior Court parallel the case plan requirements. These laws require a report to the court including a plan for providing protective services, the estimated time in which the goals of intervention may be achieved, and, if the child is in placement, the reasons why the child cannot be protected in the home and the plans for maximizing contact between the parent and child while the child is in placement. D.C. Code Ann. § 16-2319(c).

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and § 627(2)(C). The District's Abuse and Neglect Act contains similar requirements. *See* D.C. Code Ann. § 6-2107(b), § 6-2123(a)(3), and § 6-2124. The services that the CFSD is authorized to provide include emergency financial aid, temporary third-party placement with neighbors or relatives, emergency caretaker services, homemaker services, day care, counseling, medical services, and other appropriate services available in the community. D.C. Code Ann. § 6-2124.

4. Periodic Reviews

Both federal and District law require periodic judicial or administrative reviews of the status of children in foster care. Federal law requires reviews at least every six months by either a court or administrative panel. The purpose of the reviews is to "determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship." 42 U.S.C. § 675(5)(B).[6] District law similarly provides that, once a child has been adjudicated as neglected, the Family Division of the Superior Court shall hold a review hearing every six months unless the child is over the age of six and has been in custody for longer than two years. D.C. Code Ann. § 16-2323(a).

5. Adoption

Federal law contemplates adoption for those children who cannot be returned home after services have been provided. 42 U.S.C. § 627(2)(B) & § 675(5)(B). District law is more specific, requiring the CFSD to "prepare a permanent plan for the child" when rehabilitative services fail to result in reuniting the child with his family within a reasonable time.

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[6] Federal law also requires a dispositional hearing no later than 18 months after the original placement, to determine the future status of the child. 42 U.S.C. § 675(5)(C).

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D.C. Code Ann. § 6-2123(b)(2). District law also provides that when parental rights are terminated and a child is freed for adoption, the CFSD shall seek prompt adoptive placement. If no placement is made within three months, the CFSD shall list the child on all appropriate adoption exchanges. If no placement is made within six months, the CFSD shall report to the Court on its efforts to secure an adoptive placement. D.C. Code Ann. § 16-2360(b).

The CFSD's policy manual contains further requirements for recruiting adoptive families. The manual provides that, even when a child is not legally freed for adoption, his or her case must be referred to the Adoption and Placement Resources Branch of the CFSD within three days of the selection of adoption as a goal for the child. CFSD Manual of Operations at § 703.3.

6. System Infrastructure

With respect to the general infrastructure of the child welfare system in the District, both federal and local law have certain requirements: Federal law requires the District to maintain an information system from which the status, location, and goals for the placement of all foster care children may be readily determined. 42 U.S.C. § 627(2)(A). District law requires the maintenance of a Child Protection Register to index cases of abused and neglected children and assist in the treatment of those children. D.C. Code Ann. § 6-2111. District law also requires the CFSD to have "sufficient staff, supervisory personnel, and resources to accomplish the purposes of [the Abuse and Neglect Act], including the capacity to provide emergency and continuing service resources to abused and neglected children and their families." *Id.* at 6-2122(c). Moreover, District law requires the staff qualifications, caseload levels, and supervision requirements of the CFSD to be guided by the standards set out by the Child Welfare League of America or other child welfare organizations. *Id.* at § 6-2122(d).

C. Licensure of Foster Homes and Institutions

The District's Licensure Act requires every facility providing foster care in the District to be licensed and inspected annually. D.C. Code Ann. § 3-802 and 3-805(1). Facilities caring for District children outside the District must be inspected at least once a year. *Id.* at § 3-805(2).

II.

THE EVIDENCE PRESENTED AND THE COURT'S FINDINGS OF FACT

The Court was presented with various types of evidence during the lengthy trial of this case. First, the Court had before it over a thousand stipulated facts. Second, the Court was presented with several reports and case studies prepared by experts in the areas of child welfare policy and practice, social service methodology and research, the types and uses of automated information in public services programs, and the financing, administration, and delivery of human services. Third, the Court heard testimony from child psychiatrists, foster, adoptive, and natural parents, and employees of the DHS ranging from front-line social workers to upper-level management. After explaining more fully the nature of the expert evidence presented, the Court will make its findings of fact.

A. The Nature of the Expert Evidence

1. Walker Case Review

The complaint in this case names seven children as plaintiffs on behalf of the class. Their stories, according to plaintiffs, are representative of the stories of countless other children who have spent time in the District's foster care system. Introduced as evidence in this case is a report prepared by Clarice Dribble Walker, an expert in the field of child welfare policies and practices and an associate professor of social work at Howard University in Washington,

D.C.[7] For purposes of this litigation, Professor Walker prepared a "Case Review" of the case records of each of the named plaintiffs and the extent to which those records are in compliance with federal and District law and national professional standards (the Walker Report). Professor Walker based the report on her examination of the case records maintained by the DHS, as well as on deposition transcripts, reports by other experts in the field, and DHS documents, including the CFSD Manual of Operations. Professor Walker reviewed the cases in the context of her knowledge of the federal Adoption Assistance Act and Abuse Prevention Act and the District's Abuse and Neglect Act. The Walker Report details the experiences of each of the named plaintiffs in the District's foster care system, the social work and legal issues related to each, and the systemic problems identified in providing services to each of the children. The report concludes that the DHS has not complied with "the legal and social work mandate for permanency planning for children in the child welfare system," Walker Report at 5, because it has failed to make appropriate placements, set appropriate goals for children in placement, provide services toward the achievement of those goals, and move children through the system quickly so that they may obtain permanency by either returning home or being adopted.

2. Stein Case Reading

Serving as the basis for many of plaintiffs' allegations about the widespread and systemic deficiencies in the Dis-

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[7] Professor Walker also serves as chairperson for the direct services clinic at Howard University's School of Social Work. By virtue of this position, she is familiar with the policies and practices of the CFSD. Additionally, Professor Walker has served for 20 years as the senior consultant on child welfare issues for the National Black Child Development Institute. In 1989 she authored a study funded by the Skillman Foundation on the interventions and outcomes for black children entering foster care in 1986 in five cities across the country. Currently, Professor Walker serves on the Foster Care Commission of the Child Welfare League of America.

trict's foster care system is a Case Reading prepared by Theodore J. Stein, Ph.D., an expert in the fields of child welfare policy and practices and social science methodology and research (the Stein Report). Dr. Stein is a professor of social welfare at the State University of New York at Albany, where he has taught courses including "Child Welfare: Policy and Practice," "Research and Quantitative Methods," and "Law and Social Work." He has conducted six "case readings" since the passage of the federal Adoption Assistance Act and is currently working on another.[8]

Dr. Stein's case reading consisted of a review of a random sample of 675 case records for children in custody or formerly in the custody of the DHS and children who had been the subject of an investigation into a report of abuse or neglect.[9] This random sampling represents approximately 25 percent of the cases of children in foster care in the District, a figure that Dr. Stein testified is compatible with accepted scientific methodology.[10] The cases for review were selected using a table of random numbers.

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[8] Dr. Stein's professional accomplishments also include having published 24 articles and six books in the area of child welfare and presented numerous papers at professional conferences throughout the country. Dr. Stein has conducted numerous multi-state studies of various aspects of child welfare, many of which have been funded through federal grants. Dr. Stein has served as a consultant on child welfare policy for the American Bar Association, the United Kingdom, the state of New Mexico, the city of Philadelphia, and the state of Illinois, among others. His work for the state of New Mexico included developing a plan for the implementation of a federal court order regarding the state's child welfare system.

[9] Eighty percent of the sample records were for children in foster care or who had been in foster care in the year prior to the case reading. Nineteen percent were for children who had been the subject of an investigation. One percent was for children who had never actually been removed from their homes, although the DHS had reported them as being in foster care.

[10] Dr. Stein did not review a set percentage of cases of children who had been the subject of an abuse or neglect investigation, but reviewed a set number—127—of such cases.

The case review was intended to assess the District's compliance with the requirements of the federal and local statutes, the CFSD Manual of Operations, and relevant professional standards such as those of the Child Welfare League of America. To accomplish this end, Dr. Stein developed a case reading instrument broken down into 11 sections: four dealing with case plans; two with investigations of abuse and neglect; two with case reviews; one for demographic information; one for medical, psychological/psychiatric, and educational history; and one covering the monitoring of foster care and institutional facilities by the CFSD. The case reading instrument consisted of 99 pages and 178 multi-part questions. Two full-time supervisors and 18 full-time case readers assisted Dr. Stein with the case review. The case readers spent three days in training on how to use the case reading instrument and the case reading guidelines. Dr. Stein conducted two reliability tests throughout the course of the case reading, the first yielding 94 percent reliability and the second yielding 95 percent reliability. Data from the case reading instruments was entered into computers by six staff members hired for the project. Data entry was also tested for reliability, which was determined to be 99 percent.

Once the data from the case reading instruments was entered, Dr. Stein analyzed the data. His findings are broken down into eight areas making up Volume I of the case reading. These areas are: demographic information about the sample; information regarding abuse and neglect investigations; information describing case planning and service provision for children in foster care with plans of either return home, adoption, independent living, or continued foster care; information regarding medical, dental, psychiatric/psychological services, and educational progress; information on administrative and judicial reviews; and information on the monitoring of foster homes and institutions. Volume II of the case reading includes detailed case examples illustrating the findings reported in Volume I. Based on these findings and examples, Dr. Stein concluded in his report and in testi-

mony before this Court that, at the time of the case reading in early 1990, the District's foster care system was operating in much the same way as other jurisdictions had operated prior to the passage of the federal Adoption Assistance Act in 1980: as a holding system for children. Very few District children receive services to prevent their placement in foster care. Thirty-seven percent of children in the District's foster care system have been in care for four or more years and 62 percent do not have written case plans. Stein Report at 195. As a wrap-up to Dr. Stein's direct testimony at trial, he emphasized his conclusions by stating that he had not seen a system in the last eight to ten years that had made so little progress since the passage of the federal Adoption Assistance Act.

3. Center for the Study of Social Policy Report

In addition to the Walker and Stein Reports, plaintiffs introduced into evidence a report prepared by the Center for the Study of Social Policy (the Center), entitled *Children and Family Services in the District of Columbia* (September 1990) (Center Report), and consisting of an analysis of the District's child welfare system and recommendations for its improvement.[11] The Center is a nonprofit organization, based in Washington, D.C., that conducts policy research and analysis and provides technical assistance to state and local governments in various areas of human services, including child welfare. In the area of child welfare, the Center has directed comprehensive child welfare reform initiatives in three states and has provided direct technical assistance to over 20 states with respect to the financing, administration, and design of children's policies and programs. The Center staff consists of numerous professionals in the human services field and

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[11] Plaintiffs originally moved to have members of the Center's staff appointed as independent experts under rule 706 of the Federal Rules of Evidence. When this motion was denied, plaintiffs engaged the Center staff to prepare the report that was ultimately entered into evidence.

many specialists in child welfare policy. Testifying as experts during the trial of this case were three Center staff members who contributed to the report: Frank Farrow, Director of Children's Services Policy at the Center and former Executive Director of the Social Services Administration of the Maryland Department of Human Resources; Carol Wilson Williams, Ph.D., a senior research analyst at the Center and former professor of social work at the University of North Carolina and the University of California at Los Angeles; and Judith Meltzer, a senior research associate at the Center who specializes in federal entitlements funding under the Adoption Assistance Act and has offered technical assistance to a number of states regarding maximizing their federal reimbursements under the Act.[12]

The Center's report was prepared with two goals: to independently analyze the alleged deficiencies in the District's child welfare system and to propose concrete, feasible remedies for the future. The report analyzes the system in relation to the requirements of federal and District law, DHS and CFSD policies, and generally accepted professional child welfare practice. To conduct its analysis, the Center staff extensively reviewed DHS documents including all pertinent legal and policy documents produced by defendants. Center staff interviewed DHS employees, including case workers and supervisors within the CFSD, administrators in the Family Services Administration, and the Director of Income Maintenance at the DHS. Additionally, Center staff observed several depositions, including those of all four branch chiefs within the CFSD. The Center Report concludes that the District has consistently failed to meet the requirements of federal and District law and its own policy. These failures,

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[12] Charlotte Haberaecker, although not a staff member of the Center, also contributed to the Center report and testified at trial. Ms. Haberaecker is a senior manager of Management Consulting Services in the Office of Government Services at the accounting firm of Price Waterhouse. She testified as an expert in the types and uses of automated information in public services programs.

according to the report, have resulted in a system that does not adequately protect at-risk children and families. *See* Center Report at i. For each area of the District's alleged failures, the report offers several specific recommendations for improvement, both short-term and long-term. In addition, the report sets forth a proposed "Sequenced Implementation Plan," including target dates, for putting the Center's recommendations into action. See Center Report at 75-80.

4. Psychiatrists' Testimony

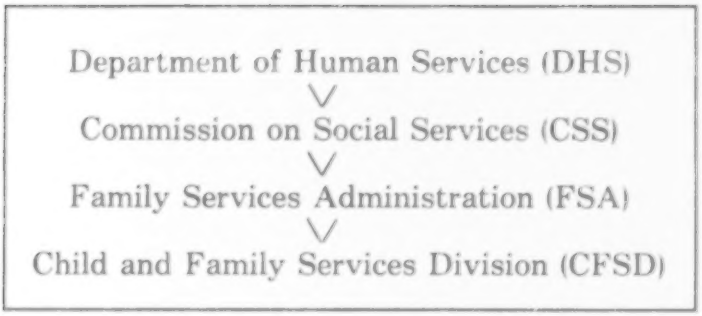
Testifying at trial were four child psychiatrists who had reviewed the case records of and conducted personal interviews with four of the named plaintiffs. Each gave their expert opinion on the psychological and emotional harm that the named plaintiffs have suffered as a result of the failures of the defendants to provide for their needs. In addition, Dr. Harold Eist gave his opinion about the psychological and emotional harm to all of the children in the plaintiff class, resulting from the systemwide deficiencies in the delivery of services to foster children and children who have been the subjects of reported abuse or neglect.

B. Findings of Fact

Based on all of the evidence presented, including the stipulations entered into by defendants, the Court issues the following findings of fact. To assist the reader in understanding the significance of these facts, the Court will first present some general findings and will then present the bulk of the remaining findings in categories that relate to the statutory framework detailed in Part I, *supra*. The Court will conclude with those findings involving harm to the plaintiff class.

1. General Findings

As the Court has previously explained, the DHS is the District's umbrella social services agency. To illustrate the hierarchy of the agency as it relates to this case:



The CFSD, which has primary responsibility for the implementation and administration of the child welfare system, is comprised of five branches:

The Intake and Crisis Services Branch (ICSB) is responsible for receiving and investigating reports of neglect filed with the CFSD. The branch maintains a 24-hour hotline specifically for this purpose. The branch also makes initial assessments of need and provides emergency and crisis intervention services. Two Intensive Services Branches (ISBs) are responsible for those cases for which an initial investigation indicates that the placement of a child is probable or that family breakdown is imminent or very likely without the provision of intensive services to the family. The branches were planned so that each social worker would handle a maximum of 20 cases and would work intensively with the assigned families in a short period of time. The Continuing Services Branch (CSB) is responsible for those cases for which the initial investigation indicates problems resulting from chronic conditions that require the continuing provision of services but are not likely to lead to total family breakdown. The branch also provides continuing services to children in foster care and their families. The Adoption and Placement Resources Branch (APRB) is responsible for recruiting foster and adoptive families, conducting home studies, and training foster and adoptive parents. Finally, the Monitoring Unit, which is not a "branch" but a separate unit reporting directly to the division chief, is responsible for monitoring all foster

homes and group homes in which children in the custody of the CFSD are placed and which are located within a 50-mile radius of the District of Columbia. The unit monitors these facilities to ensure compliance with all federal and local statutes and regulations. *See* CFSD Policy Manual at Chapter 100.

According to stipulations entered into by the parties, as of September 30, 1988, 2,166 children were in foster care in the District of Columbia. As of June 1989, the average stay for children in the District's foster care system was 4.8 years. This compares to a national average of just over two years. *See* Center Report at ii. According to the Stein Report, as of December 1989, 27 percent of the children in the District's custody had been in that status for more than five years and 60 percent had been in custody for more than two years. Approximately 95 percent of the children in the District's foster care are black.

2. Abuse and Neglect Investigations and Preventive Services

a. Timeliness of Investigations

Both federal and District law require prompt investigations into reports of abuse or neglect. 42 U.S.C. § 5106a(b)(2); D.C. Code Ann. § 6-2102(b). District law and CFSD policy specify 24 hours for initiating investigations and two weeks for completing investigations. D.C. Code Ann. § 6-2102(b) and CFSD Manual of Operations at § 301.15. Despite these stringent requirements, the stipulations entered into by the parties indicate that for several months during 1988, 1989, and 1990, the department consistently failed to initiate timely investigations into reports of neglect[13] and consistently failed to complete investigations within two weeks. In August 1988,

[13] The CFSD is responsible for investigating only reports of neglect. The District's police department is responsible for investigating reports of abuse. D.C Code Ann. § 6-2104.

for example, the ICSB failed to initiate investigations into five reports of neglect it received that month, involving seven children. As the backlog began to worsen, the then-acting-chief of the CFSD, Evelyn Andrews, notified the administrator of the FSA in her November 1988 monthly report that:

> Staff shortages in the critical area of protecting children has [sic] required supervisors to take uncovered caseloads, staff to cover for co-workers who are in the field or on leave (there has been a significant increase in staff absenteeism), staff to attempt to fulfill the demands made through court orders, and make every effort to comply with mandated timeframes. It is virtually impossible to protect children in such an environment and under the current conditions. *Children are at risk.*

Stipulation 137. One month later, in December 1988, the branch failed to initiate investigations into 30 reports it received that month, involving 84 children. At that time, the branch also had a backlog of 584 reports, involving 828 children, for which investigations had not been completed.

Despite the dire situation within the CFSD in December 1988, the backlogs continued to worsen throughout 1989 and 1990. In June 1989, the ICSB failed to initiate investigations into 50 reports it received that month, involving 75 children. It also ended the month with a backlog of 716 reports, involving 1,285 children, for which it had not completed investigations. A study conducted in fiscal year 1989 by the chief of the ICSB revealed that the average length of time between the receipt of a report of neglect and the branch's initiation of an investigation was ten days.

Although the ICSB chief's report revealed serious and continuing failures to comply with District and federal law, the backlogs continued to grow. In January 1990, the ICSB failed to initiate investigations into 91 reports received during the month, involving 171 children. Additionally, it had

a backlog of 1,112 reports, involving 1,853 children, for which investigation had not been completed. At the end of January 1990, the ICSB had only 12 social workers assigned to it to conduct investigations. Defendants have stipulated that as of February 1, 1990, staffing shortages within the CFSD prevented workers from initiating investigations within the statutory time period.

The number of backlogged investigations dipped slightly in early 1990, so that by April 1990, a new study conducted by the chief of the ICSB revealed that the average length of time between the receipt of a report and the initiation of an investigation had dropped to four days. Nevertheless, for nearly 50 percent of the reports received during April 1990, the ICSB failed to initiate an investigation within 24 hours. Moreover, the branch ended each month between July 1989 and May 1990 with an average backlog of approximately 1,200 reports for which it had not completed investigations. The backlogs were reported by the then-chief of the ICSB, Carolyn Smith, to the chief of the CFSD, Evelyn Andrews, in June 1990. Ms. Smith also reported that the branch lacked a sufficient number of automobiles to investigate neglect reports within 24 hours. Ms. Andrews reported the situation to the then-administrator of the FSA, Jean Hunter,[14] in her June monthly report.

During the summer of 1990, the ICSB borrowed workers from other branches and tried to alleviate the backlog by working significant overtime hours. Nevertheless, by the end of August 1990, the ICSB had failed to initiate investigations into 41 reports it received that month, involving 93 children. It had also failed to complete investigations for 445 reports, involving 750 children. As of October 1990, it was

[14] Ms. Hunter was originally named as a defendant in this action. She retired prior to the trial and defendant Elizabeth Parker is currently the acting director for the FSA.

taking the ICSB up to five days to initiate investigations into reports of neglect. According to the testimony of Carolyn Smith, as of December 1990, for the three units within the ICSB on the day shift, there were four vacancies out of a possible full staffing level of 15 social workers. On the evening shift, there were four vacancies out of five social worker positions. The midnight shift, primarily responsible for receiving reports and staffed in part with paraprofessionals, was fully staffed. Based on the foregoing facts, almost all of which have been stipulated, this Court finds that the CFSD has, since at least the beginning of 1988, continuously failed to initiate investigations into reports of neglect or abuse within 24 hours and complete investigations within two weeks. These failures have been largely due to staff shortages and the lack of access to resources, such as automobiles, necessary to conduct investigations. The Court also finds, based on the testimony of Dr. Williams, an expert in the field of child welfare policy, as well as Ms. Smith, the former chief of the ICSB, that the failure to initiate timely investigations can be partially attributed to the inability to screen out inappropriate reports. Although many jurisdictions use screening instruments to lessen the number of reports requiring investigations, District law currently requires the investigation of all reports of neglect or abuse.

b. Provision of Preventive Services

Both federal and District law require the provision of services to enable a child for whom a report has been made to remain in the home or, if removal is necessary, to enable the child to return home as quickly as possible. *See* 42 U.S.C. § 5106(b)(2) & (b)(3); D.C. Code Ann. § 6-2105 & 6-2124. The CFSD is authorized to provide services including emergency financial aid, shelter, emergency caretaker services, homemaker services, day care, counseling, medical services, and other appropriate services. D.C. Code Ann. § 6-2124. Based on the testimony of Dr. Stein and Professor Walker, the

Court finds that the CFSD has consistently failed to provide the services required to enable children to remain with their families or reunite with them if temporary placement is required.

According to Professor Walker's testimony and report, none of the case records of the named plaintiffs indicates that any services were provided to prevent placement. Similarly, according to the case reading conducted by Dr. Stein, none of the case records studied contained a judicial determination that "reasonable efforts" had been made to prevent placement, in accordance with federal law. Although defense counsel elicited through cross examination that the absence of a record of services in the children's case records does not necessarily mean that no services were provided, the Court finds little or no reason to believe that services were indeed provided. Testimony of social workers and of the former chief of the ICSB revealed that services frequently are not provided because they are not available. Defendants have admitted that although a number of parents have substance abuse and mental health problems, the CFSD has no drug treatment services or counseling services that it can provide directly to families in need. Similarly, although a substantial number of parents have housing and unemployment problems, the CFSD does not have the capability to directly provide housing or job services. Because the CFSD is unable to provide many direct services and does not have any priority access agreements with other agencies or organizations, defendants have candidly admitted that the CFSD has insufficient service resources to meet the "reasonable efforts" requirement of federal law. Based on the foregoing, the Court finds that defendants have consistently failed to provide services or otherwise use "reasonable efforts" to prevent placement. The result has been an increased risk of arbitrary or inappropriate placements as well as an increased cost to the District.

3. Continuing Services

a. Placement

Once a child has come into foster care, either through voluntary placement or emergency placement resulting from a substantiated abuse or neglect investigation, both federal and District law place limits on the time a child may remain in care without a judicial determination that placement is in the child's best interests. Federal law mandates that a child return home within 180 days unless such a determination has been made, 42 U.S.C. § 672(e); District law mandates return home within 90 days unless the CFSD has requested the filing of a neglect petition in Superior Court. D.C. Code Ann. § 6-2123(2).

By defendants' own admissions, since at least 1987, children have consistently remained in voluntary care for more than 90 days without the filing of a neglect petition. Between October 1, 1987 and September 30, 1988, nearly 75 percent of the children in voluntary placement had been in that status for longer than 90 days.[15] As of April 1988, there were children in voluntary care who had been in that status for as long as two years without any neglect petition having been filed. One of the named plaintiffs, LaShawn A., was in voluntary care for two-and-a-half years. Several of the other named plaintiffs were also in voluntary care well beyond the 90-day time limit imposed by District law. As of April 1988, defendants have admitted that there was no accurate listing of the number of children in voluntary care and that the DHS lacked a system for tracking voluntary care cases and for monitoring services to the families of children in voluntary care. These facts were presented to the

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[15] Between September 1987 and March 1988, the CFSD established a special unit known as the Emergency Care Unit within the Intensive Services Branch. During the six months the unit operated, it successfully reunited, within the mandatory 90-day time period, 27 of 68 children referred to it. As a result of budgetary constraints, however, the CFSD disbanded the Emergency Care Unit in March 1988.

administrator of the FSA in a memo submitted by Evelyn Andrews in July 1988. Ms. Andrews continued to submit similar memos to the administrator of the FSA throughout 1989 and 1990 as the problem continued to persist.

Based on defendants' admissions and the uncontroverted testimony of the experts in the case, the Court finds that the CFSD has consistently failed to comply with the statutory time limits regarding voluntary and emergency care. The result has been a state of limbo for these children who, while in "emergency care," do not have any case plans prepared on their behalf. The misuse of voluntary and emergency care in the District is one of the reasons why foster care drift has occurred for so many children in the District foster care system.

The evidence presented in this case has revealed that not only are children remaining in voluntary or emergency care beyond the statutory time limits, they are also spending much of their foster care experience in inappropriate placements. Federal law and CFSD policy require the placement of children in the least restrictive setting and in close proximity to their families. *See* 42 U.S.C. § 675(5)(A); CFSD Manual of Operations at § 602.5(a). According to Professor Walker's testimony and report, all of the named plaintiffs were placed inappropriately: LaShawn A., who came into the CFSD's care when she was two years old and was a "special needs" child,[16] was placed in the home of an elderly foster mother who had no intention of adopting her. Demerick B. came into care at 11 months of age and was placed in a congregate facility for three years rather than in a family foster home where he could have developed a continuous and affectionate relationship with a single adult. Gary C. and Leo C. came into emergency care when their mother was hospital-

[16] According to the testimony of CFSD employees, a "special needs" child is one who is over five years of age, is part of a sibling group, or has physical or emotional problems.

ized for psychiatric treatment. They were placed in a congregate facility where they remained for nearly two years without a consistent, nurturing care giver. Robert D. came into care when he was a year-and-a-half old and was abandoned by his mother. He has been in six different family foster homes and one group home, experiencing no continuity of care and severe foster care drift. Tyrone E. was seven years old when he was removed from his home due to reports of abuse. Although he is a special needs child with severe emotional problems, he was inappropriately placed in multiple foster homes in which the foster parents had received no special training. He was also placed in over-restrictive out-of-state facilities that were hundreds of miles from his family. Kevin E. was placed in foster care when he was 20 days old and has spent all but 43 days of his life in foster care. He is a special needs child who has suffered additional trauma from the prolonged placement in congregate care as an infant and the experiences of at least three abrupt separations from foster families who had indicated plans to adopt him. He was inappropriately returned to his mother, who was an unfit parent, on several occasions. These inappropriate placements, along with others, have been partially the result of social worker vacancies that preclude sufficient training sessions and home studies to ensure appropriate placements.

Defendants have admitted that the demand for foster homes has outpaced the supply and that since at least January 1989, the CFSD has frequently been unable to place all of the children for whom it has received requests for placement. Since at least 1988, there has been an increase in the number of children entering foster care with special needs. Although these children cannot adequately be cared for in traditional foster homes, the DHS does not directly operate any therapeutic foster homes.[17] The only such homes avail-

[17] Therapeutic foster homes are those in which the foster parents have been specially trained and receive special services to help them handle special needs children.

able to the CFSD are those operated by the Consortium on Child Welfare. As of November 1990, the department was making no efforts to develop therapeutic foster homes.

Similarly, although the CFSD needs foster homes designed to provide short-term or emergency care for children, it has no foster homes designated for this purpose. It also has an insufficient number of foster homes in which to place babies who have tested HIV-positive. Perhaps as egregious a fact as any is the defendants' own admission that the CFSD placement office has no automated information system to enable it to identify vacancies in foster homes, group homes, and institutions. The placement coordinator must telephone individual foster homes to determine if space is available. When the placement coordinator is unable to identify a placement vacancy, the task falls on the child's social worker and supervisor. The testimony of a frontline social worker within the CFSD, Chainie Scott, revealed that children often end up spending entire days in social workers' offices while the workers attempt to locate placements. In light of all of the foregoing facts, most of which have been stipulated, the Court finds that defendants have consistently failed to place children in the least restrictive placements consistent with their needs.

b. Case Planning

Federal and District law, as well as the CFSD's own policy, require the timely preparation of case plans for all children in foster care. *See* 42 U.S.C. § 675(a); 45 C.F.R. § 1356.21(d); D.C. Code Ann. § 6-2107(b); CFSD Manual of Operations at § 401.2. According to the uncontroverted testimony provided by plaintiffs' experts at trial, reasonable professional standards require case plans to articulate specific goals with realistic strategies and timelines for accomplishing them. Case plans are necessary to ensure that children receive proper care, are placed in appropriate settings, and remain in foster care no longer than necessary. To assure these things, a good permanent placement system for children

should ensure that children who cannot remain with or be returned to their biological parents be freed for adoption and placed in adoptive homes. When adoption is the goal, the responsible agency should aggressively recruit potential adoptive families and should implement all relevant procedures to allow children to become legally available for adoption in a timely manner. Long-term foster care should be used only rarely, and only when appropriate.

CFSD policy provides for five possible case plan goals: return home, placement with a relative or other person, adoption, independence, or continued foster care. Independence is only appropriate as a goal if the child is over the age of 16 and all other permanent options have been ruled out. Continued foster care is not to be the goal unless the child is at least 13 years old and all other permanency options have been ruled out because of the child's rejection of adoption due to an attachment to the foster parents or to the natural parents. CFSD Manual of Operations at § 401.4. Goals are to be set for one-year timelines and should not exceed 18 months, except for the goals of independence and long-term foster care.

Despite these policy guidelines, the evidence presented in this case establishes that children are often given totally inappropriate goals. According to the Stein Report, approximately 8 percent of the children in the District's foster care have a planning goal of independent living. Of those with such a plan as of December 1989, 35 percent had been assigned that goal before they were four years old and 49 percent had been assigned that goal before they were 16 years old. Approximately 10 percent of the children in the District's foster care have a planning goal of continued foster care. Of those with such a plan as of December 1989, 29 percent had been assigned that goal before they were one year old, 48 percent had been assigned that goal before they were four years old, and 54 percent had been assigned that goal before they were 10 years old. In 47 percent of these cases,

there was no evidence of efforts to return the child to his or her family, and in 56 percent of these cases, there was no evidence that the CFSD had considered adoption.

Dr. Stein's report revealed the following, among other things, with respect to the existence of case plans: Of the children in the District's custody with a planning goal of return home as of December 1989, 62 percent did not have a written case plan. Of the 38 percent who did have written case plans, none contained all of the information required by federal law. *See* 42 U.S.C. § 675(1) and the discussion at Part I(B)(2), *supra*. These plans routinely failed to include information on goals, strategies for achieving those goals, and timeframes. Also absent from the files of many of the children with goals of return home were visiting schedules mandated by the CFSD policy. *See* CFSD Manual of Operations at § 401.2(h). Seventy percent of these children had no parent-child visiting schedules in their records, 91 percent had no worker-child visiting schedules, and 94 percent had no worker-parent visiting schedules.

Professor Walker's report was also quite revealing: in none of the named plaintiffs' case records did she find a written case plan that contained all of the information required by federal and District law and reasonable professional standards.

The defendants' admissions strongly support the observations of both Dr. Stein and Professor Walker. The defendants have admitted that as of July 1990, the caseloads in the Intensive Services Branches and the Continuing Services Branch were so high that workers were unable to closely monitor families or develop case plans in a timely manner. With respect to implementing the goals set for children in foster care, the evidence speaks for itself: for those with goals of return home as of December 1989, 52 percent had had that goal for 18 months or more, 41 percent for two or more years, and 23 percent for three or more years. Even more revealing is the fact that the average stay for children in the

District's foster care system is just under five years—a third of their childhoods.

Based on the foregoing, the Court finds that the CFSD frequently assigns inappropriate goals to the children in its foster care and consistently fails to prepare written case plans to enable the children to realize their goals. Although defense counsel repeatedly elicited trial testimony that the need to respond to frequent "crises" often precludes the preparation of case plans, the Court finds, based on the uncontroverted expert testimony, that the results of not having a case plan may be just as devastating as the results of most crises. Without a case plan that sets forth a goal and a means of achieving it, children are relegated to spending significant chunks of their childhoods, if not their entire childhoods, in foster care, constantly bouncing from crisis to crisis.

c. Services

Just as the CFSD has often failed to provide any services to prevent the removal of children from their homes, the Court finds based on the evidence before it that the CFSD has consistently failed to provide services once children are removed from their homes and placed in foster care. The Stein Report indicates that, based on case records, of the children in foster care as of December 1989 whose goal was return home and who had entered into care through voluntary placement, the CFSD had failed to provide services in 77 percent of their cases. The failure to provide services designed to facilitate a child's return home is frequently due to the unavailability of those services.

The evidence reveals that the CFSD is failing to provide other necessary services as well—those that would constitute "proper care" under federal law. *See* 42 U.S.C. § 675(1). Although CFSD policy mandates that all children entering care undergo a complete medical evaluation prior to placement, see CFSD Manual of Operations at § 602.8(a), reports submitted by Evelyn Andrews to the administrator of the

FSA between May 1988 and May 1990 indicate that the CFSD did not have adequate medical screening facilities for children coming into care. Once in care, Dr. Stein's report indicates that as of December 1989, 44 percent had not had a medical examination since their entry into care. Seventy-nine percent had not had a dental examination.

Although CFSD policy requires that a social worker have "face-to-face contact" with each child in foster care at least once a month, see CFSD Manual of Operations at § 603.2(a)(1), Dr. Stein's report reveals that in the cases of 64 percent of the children in the District's foster-care custody with a planning goal of return home as of December 1989, there was no evidence that the children had ever been visited by their social workers. Of the children with a planning goal of adoption as of December 1989, there was no evidence of visits in 52 percent of the cases. According to defendants' own admission, as of October 1990, 149 children in the District's foster care had no social worker assigned to them.

Based on the foregoing, the Court finds that the CFSD has consistently failed to provide appropriate services and proper care to children in its custody.

d. Perodic Reviews

Both federal and District law require periodic judicial or administrative reviews for the purpose of determining the continued need for and appropriateness of placement. See 42 U.S.C. § 675(5)(B); D.C. Code Ann. § 16-2323(a). According to the Stein Report, of the children in foster care as of December 1989 who were eligible for a six-month review, only 13 percent had received a timely review. Defendants have admitted that as of August 1, 1990, children were not receiving timely administrative reviews. Based on the foregoing, the Court finds that the CFSD has consistently failed to comply with federal and District requirements regarding judicial and administrative reviews.

e. Adoption

District law requires that the CFSD "prepare a permanent plan" for a child when he or she cannot be returned to the home within a reasonable length of time. D.C. Code Ann. § 6-2123. According to the unrebutted testimony of plaintiffs' experts in this case, such permanency planning is also required, under all reasonable professional standards for child welfare. To achieve permanency for children who cannot return home, it is crucial that parental rights be terminated and that children be legally "freed" for adoption. Defendants have admitted that children who are not legally freed for adoption are less likely to be considered for adoption by prospective adoptive parents than those who have been freed. Nevertheless, of the children in the District's foster care with a planning goal of adoption as of December 1989, 66 percent had not been legally freed for adoption. As of July 30, 1990, the majority of children that the CFSD's adoption coordinator was trying to place were not legally freed. This results in "at-risk adoptions" in which a potential adoptive parent takes a child into custody with the risk that parental rights will not be terminated and the parent will never be able to legally adopt the child.

According to the Stein Report, for those children who, as of December 1989, had a planning goal of adoption but were not yet legally freed for adoption, in only 26 percent of the cases had information concerning terminating parental rights been submitted to an attorney. For half of these children, the CFSD staff had failed to discuss the possibility of relinquishment of parental rights with their mothers. Testimony on behalf of the defendants revealed that the blame for failing to terminate parental rights lies jointly with the District's Office of Corporation Counsel. Even when the CFSD provides the necessary information to an attorney in the Corporation Counsel's office, according to the testimony of Evelyn Andrews, the attorney often refuses to seek termination of parental rights until an adoptive family is found. This presents a Catch-22 because the Adoption and Placement

Resources Branch (APRB) often is unable to recruit adoptive parents until parental rights have been terminated. Additionally, defendants have admitted that although in the spring of 1990 an attorney was hired specifically to file and prosecute termination petitions, by August 1990, the Office of Corporation Counsel had not formally authorized the attorney to file such petitions. Based on the foregoing, the Court finds that the CFSD has consistently failed to expedite the progression of the children in its custody toward permanent placement through adoption.

Part of the CFSD's failures can no doubt be attributed to its noncompliance with its own policy that children with a goal of adoption be referred to the APRB within three days of setting that goal. See CFSD Manual of Operations at § 703.3. Nor has the CFSD complied with District law requiring certain recruitment efforts such as listing children on appropriate adoption exchanges. Defendants have stipulated that in the case of the named plaintiff Demerick B., for whom it was recognized early on that return home would be impossible, no referral to the APRB was made for a year-and-a-half after his last parental visit and two months after he was adjudicated as a neglected child. After the referral, which occurred in January 1988, Demerick's picture was never even displayed to a potential adoptive parent for another year. He was referred to only one adoption exchange. There was no case plan in Demerick's record until June 1989. In August 1989, when Demerick entered into an at-risk adoption placement, no motion had been filed to terminate parental rights. As of May 23, 1990, Demerick continued to be in foster care and was not yet legally adopted.

Dr. Stein's report reveals that the delays in Demerick's case also occur in the cases of numerous other children. For those in foster care as of December 1989 with a goal of adoption, the cases of only 29 percent had been referred to the APRB within the required three days. In 14 percent of the cases, notification was sent to the APRB more than a year

after adoption was chosen as a goal. Moreover, of the children who were freed for adoption as of December 1989 but who had not been placed in pre-adoptive homes, 24 percent had never been referred to the APRB for placement. Defendants have stipulated that the high caseloads of the social workers within the CFSD prevent them from making adoption referrals in a timely manner.

The evidence presented on both sides of this case reveals that once a child has been referred to the APRB for placement, the wait for an adoptive home may be lengthy indeed. Defendants have stipulated that as of August 1990, only one-and-a-half employees were responsible for recruiting all adoptive and foster parents. Since that time, according to the testimony of Geneva Ware, who was appointed supervisor of a newly created Recruitment Unit in August 1990, there have been three employees actively recruiting potential adoptive and foster parents. Nevertheless, as Ms. Ware admitted at trial, the unit's efforts to recruit have not kept up with the demand. The Court is somewhat encouraged by defendants' belated recognition of the need to enhance recruiting efforts, but notes that even as Ms. Ware was testifying about the inability to keep up with demand, another witness in this case testified that she had been waiting for over a year to adopt a foster child.

f. System Infrastructure

Federal and District law contain requirements pertaining to case tracking, caseloads, supervision, and training. The facts related to these "infrastructure" elements will be discussed in turn.

i. Case Tracking

Federal law requires any child welfare agency receiving federal funds to maintain an information system from which the status, location, and goals for the placement of all foster care children may be readily determined. 42 U.S.C. § 627(2)(A). Such a system is also mandated by reasonable professional

standards and, this Court believes, by basic common sense. Defendants have admitted that although its current information system, the WARD Tracking System (WTS), was designed to collect and process information regarding case management, client tracking, and vendor payments, the system is not adequate According to the unrebutted testimony of Charlotte Haberaecker, an expert in the types and uses of automated information systems for human services agencies, the WTS cannot provide accurate information on the number of children in emergency care, how long they have been in that status, and when they are reaching the 90-day deadline for remaining in that status. The WTS also is unable to accurately identify the physical location of all of the children in foster care. Additionally, it does not contain accurate information concerning vacancies in foster homes, nor does it contain accurate information regarding which social workers are assigned to which children.

Ms. Haberaecker's testimony is supported by numerous of defendants' admissions. Defendants have admitted that the CFSD lacks sufficient staff to operate and maintain the WTS. An April 1988 memorandum to the former administrator of the FSA warned that children were not being entered into the system in a timely manner, if at all. Defendants acknowledge that because much of the information in the system is missing or out-of-date, the system cannot generate accurate and meaningful reports about placement vacancies, overplacements, administrative reviews, court activity, family visits, or caseworker assignments. Although the system requires substantial upgrading, no budget money has been made available for the work. Instead, CFSD social workers track information on thousands of three-by-five-inch index cards. Over the last several years, the deficiencies in the system were repeatedly made known to high-level officials within the administration of the former mayor of the District of Columbia, Marion Barry, as well as to the mayor himself. In June 1989, the former administrator of the FSA met with then-mayor Barry to inform him that the system's

deficiencies precluded the CFSD from performing its assigned tasks.

The Court's concluding findings in this area are plucked from nearly 100 of defendants' stipulations regarding information tracking. In the words that defendants stipulated to:

> As of August 1, 1990, the District of Columbia had no information system that identified all children in the District's foster-care custody.

Stipulation 1549.

> The CFSD placement office has no automated information system so as to enable it to track the location of children placed in foster homes, group homes, or any other type of placement.

Stipulation 1563.

> In a memorandum dated March 27, 1990, the DHS employee responsible for the operation of the Ward Tracking System (WTS) notified the office of defendant Barbara Burke-Tatum [the commissioner of the Commission on Social Services] that it was necessary to confer upon the WTS office official status within DHS so DHS could qualify for federal reimbursement for WTS operations.

Stipulation 1567.

> In a March 30, 1990, memorandum, defendant Barbara Burke-Tatum was notified that, because the DHS office that operates the Ward Tracking System had no official status within DHS, the Department was unable to apply for federal funds that would otherwise cover 90% of the office's costs. According to the memorandum, "In a time of tight budgeting for direct services it is unconscionable not to maximize resources. It would be a relatively simple matter to place this office either in OIS or FSA where reimbursements would be forthcoming and adequate staffing could be provided."

Stipulation 1568.

> Because the DHS office that operates the Ward Tracking System had no official status within DHS, the Department was unable to apply for federal funds that would otherwise cover 90% of the office's costs.

Stipulation 1569. Based on the foregoing, the Court finds that the WTS is clearly inadequate for keeping track of the children in the District's foster care. The Court can only wonder how an agency that cannot track the location of the children in its custody can possibly comply with the remaining requirements of federal and District law, much less with reasonable professional standards.

ii. Caseloads

The Court need not look beyond defendants' own admissions to issue its findings in the area of social worker caseloads.[18] Defendants have admitted that the ICSB must be fully staffed in order to initiate investigations within 24 hours of receipt, that the ISB social workers should have maximum caseloads of 20 families so that they are able to provide needed casework services, and that CSB workers should have caseloads not to exceed 35 to 40 families per worker. These maximum caseloads have been greatly surpassed for at least the last several years, leading to the CFSD's inability to initiate timely investigations, provide needed services, ensure appropriate placements, prepare case plans, visit with foster children and parents, recruit foster and adoptive families, monitor foster homes and institutions, and claim all federal funding to which the CFSD should be entitled. The excessive caseloads have been due in large part to the department's admitted failure to fill social worker vacancies. This failure has been in part the result of the department's former policy of hiring "term" employees rather than permanent employees and of the low salaries in comparison to neighboring jurisdictions.

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[18] Defendants stipulated to over 200 facts in this area.

Defendants' admissions indicate numerous occasions over the past several years in which officials within the Barry Administration were made aware of the severe staff shortages within the CFSD. Scores of intradepartmental memos warn that the staff shortages may result in failure to comply with the District's Prevention of Child Abuse and Neglect Act and that staff must be hired to avoid serious injury or death to children in custody. As early as July 1988, the former mayor was notified by the chair of his Committee on Child Abuse and Neglect that the "severe staffing problem" in the CFSD was "creating a situation that is detrimental to the safety and well-being of children and the preservation of families. It has affected all levels of every program and service area, which adversely impacts upon the Division's ability to comply with Federal and District laws and regulations and to provide comprehensive services to families and children." Stipulation 1161. In August 1988, then-mayor Barry told CFSD workers that 32 new social workers would be hired by October 1, 1988. This promise was the upshot of several meetings and memorandums from front-line social workers to high-level department officials. These social workers had complained that they were unable to adequately protect the safety of the children assigned to them because of the high caseloads and lack of resources such as automobiles. By October 1, 1988, only one new worker had been hired, seven had left, and the CFSD had not acquird new automobiles. As of October 10, 1988, only 10 new workers had been hired.

In June 1989, then-mayor Barry was again informed about the severe staff shortages. He was told that 41.3 percent of CFSD staff positions were vacant and that the "tremendous amount of stress that leads to worker burnout" contributes to the "rapid turnover" of social workers. Stipulation 1183. The former mayor was informed again in November 1989 and January 1990 that the CFSD was experiencing serious staff shortages. Nevertheless, on June 28, 1990, the District

of Columbia instituted a hiring freeze that barred filling CFSD vacancies.

Recently, the DHS has undertaken new efforts to fill its empty social worker positions. As of November 1990, according to the testimony of the acting administrator of the FSA, Elizabeth Parker, the department began hiring on a permanent basis. It is also converting its term employees to permanent positions. Additionally, according to Ms. Parker's testimony, the paperwork to increase social workers' salaries to a competitive level was, at the time of trial, on the city administrator's desk. The department has also run ongoing vacancy announcements and participated in job fairs and campus recruitments in an effort to recruit new workers.

Despite the evident attempts to attract workers, there is no indication yet that the past failures have been remedied. Instead, the fact remains that, at the time of trial in February 1991, 107 of a total of 239 social worker positions in the CFSD remained vacant. Chainie Scott, a social worker in the CSB, testified that as of January 1991, she was responsible for 69 families and 251 children. Although this was down from a high of 131 families and over 300 children, it was still well above the maximum caseloads that defendants have admitted must not be exceeded for social workers to do their jobs. Ms. Scott testified that even with her caseload down to 69 families, it is impossible for her to visit each child regularly. Instead, she sees the children only when a crisis arises or when a court hearing is approaching. The Court finds that, based on defendants' admissions, Ms. Scott's testimony, and the unrebutted testimony of plaintiffs' experts, the CFSD is unable to carry out its responsibilities under federal and District law while its social workers are operating at existing caseloads

iii. Supervision

The uncontroverted expert testimony presented to the court is that reasonable professional standards require super-

visors to play a role in educating, supporting, and directing staff; in ensuring quality control; and in ensuring that the child welfare agency's policies are carried out. By defendants' own admissions, the extreme staff shortages have resulted in CFSD supervisors carrying caseloads normally assigned to social workers. By carrying heavy caseloads, these supervisors have been unable to train staff and monitor cases to ensure the safety and well-being of the children for whom their staff is responsible.

iv. Training

According to the uncontroverted testimony of plaintiffs' experts, reasonable professional standards require specialized training for handling cases of child maltreatment and providing services. Ongoing training should be provided to case workers, managers, supervisors, social service representatives, foster parents, respite providers, parent aids, and homemakers. Although defendants agree that new social workers should receive formal training and existing social workers should receive ongoing training, until June 1990, no such training was available. In June 1990, the DHS hired James Oliver to set up a training program in the CFSD. At the time of trial, the CFSD had conducted two training sessions, involving approximately 70 social workers, in the areas of general information about the DHS, specific case planning and case management skills, and the requirements of federal and District law. The training sessions consisted of between 30 and 40 hours each but included no field training. Mr. Oliver testified that more training sessions are planned for the future and will be directed toward existing social workers, management, and clerical staff, as well as to new social workers. Mr. Oliver testified that he hopes to have completed a session of training for everyone in the CFSD by the end of 1991, at which time he will take over the position of chief of one of the Intensive Services Branches. Mr. Oliver stated that he anticipates ongoing training after 1991.

The testimony of Mr. Oliver indicates that defendants have at last taken positive steps toward implementing a training program that may eventually comply with reasonable professional standards. The Court remains concerned, however, that . . . Mr. Oliver's plan for continued training sessions is not embodied in any kind of written document submitted to the Court, as remains true of other promised reforms the Court heard about from the District. With the fragile budget situation that faces the CFSD, the DHS, and the District as a whole, there is no guarantee that training will not be cut due to lack of funding. The Court is also concerned that there is still no orientation training provided to new social workers before they begin working on cases. Chainie Scott and Thomas Wells, both social workers in the Continuing Services Branch, testified at trial that such training would have been very valuable to them. In sum, although the Court finds that the training program just initiated by defendants is a good start, it does not yet rise to the level that professional standards deem adequate.

5. Monitoring Foster Homes and Institutions

District law requires facilities providing foster care within the District to be licensed and inspected annually. Facilities caring for children outside of the District must also be inspected annually. D.C. Code Ann. § 3-802 & 3-805. Similarly, the CFSD Manual of Operations requires regular evaluations of all foster homes and facilities to ensure their quality and compliance with applicable laws and regulations. CFSD Manual of Operations at § 902.2.[19] The Monitoring Unit, within the CFSD, is responsible for this task. Unfortunately, as defendants have readily admitted, the same

[19] The CFSD manual requires biannual reviews rather than annual reviews as required by District law. No explanation has been provided for this discrepancy; however, Evelyn Andrews testified at trial that the Monitoring Unit is responsible for yearly visits to traditional foster homes and group homes.

problems with staff shortages and high caseloads have negatively affected the Monitoring Unit's ability to carry out its responsibilities.

In preparing his report for use in this case, Dr. Stein requested the records of 123 foster homes in which 210 children were located. The Monitoring Unit provided him with the records of 108 foster homes.[20] All of these homes had been approved for the placement of children, but there was evidence of biannual reviews in only 57 percent of them.

The defendants' own admissions corroborate Dr. Stein's report. According to stipulations entered into by the parties, between December 1988 and July 1990, the Monitoring Unit failed to monitor any of the foster homes operated by the Consortium for Child Welfare in which District children were placed. In July 1990, the supervisor of the unit admitted that the unit had insufficient staff to monitor foster homes and group homes as required by the CFSD policy. The supervisor believed the unit needed two additional social workers to carry out its responsibilities. Based on the Stein Report and defendants' own admissions, the Court finds that the CFSD has consistently failed to monitor foster homes and institutions in accordance with the requirements of District law and CFSD policy.

6. Missed Financing Opportunities

Plaintiffs' experts and defendants themselves agree that early intervention and the provision of preventive services is more cost-effective than removing a child from the home. In a June 1988 Briefing Overview to then-mayor Marion Barry, the DHS reported that during fiscal year 1987, an average of $5,000 to $6,000 was spent per family per year for preventive services, while an average of $17,000 was spent on each child in specialized foster care and group homes and an average of $50,000 was spent on each child in residential

[20] The other 15 could not be located.

treatment facilities. Virtually the same figures were presented to the mayor in the department's June 1989 Briefing Overview.

According to the uncontroverted testimony of Judith Meltzer, an expert in the financing, administration, and delivery of human services including child welfare services, the DHS currently allocates and spends funds in the least cost-effective way possible by spending large sums on out-of-home care and little on preventive services. According to Ms. Meltzer, by establishing a program to provide intensive in-home services to prevent the need for placement in foster care, the department could save from $1 to $2 million per year by the second year, assuming only a 40 percent success rate. Approximately 20 families could be provided intensive in-home family services for the cost of placing one child in a residential facility. In the case of named plaintiff Demerick B., Ms. Meltzer estimates that the DHS could have saved roughly $12,000 per year by placing Demerick in a foster home with supportive services rather than in the expensive residential treatment facility where he spent three years.[21] Had he been placed in an adoptive family, the department probably would have spent roughly $12,000 over the entire three-year period. In the case of named plaintiff Tyrone W., Ms. Meltzer estimates that placements in three foster homes, two hospitals, and two residential treatment facilities over a 28-month period cost the DHS approximately $100,000. Alternatively, had the DHS provided Tyrone and his family with intensive in-home services including mental health counseling, day care, and homemaker services, designed to prevent Tyrone's removal from the home, the estimated cost would have been $46,000. Defendants have offered no expert

[21] Ms. Meltzer estimates $17,000 per year per child for placement in a foster home with supportive services and $29,000 per year for placement in St. Ann's Maternity and Infant Home, where Demerick was placed. The cost for placement in St. Ann's is based on the monthly cost as of the summer of 1990.

testimony to rebut Ms. Meltzer's estimates or her conclusions. Based on this, the Court finds that the DHS is not using its funds in a cost-effective manner, resulting in children being removed from their homes and placed in foster or institutional care without any reasonable efforts having been expended to permit them to remain at home.

In addition, Ms. Meltzer gave uncontroverted testimony that the District is currently losing millions of dollars in available federal funds because of its serious management and systemic deficiencies. Federal reimbursements under the Adoption Assistance Act are "open-ended." That is, there is no cap on the amount of money a state agency may receive for certain eligible activities or services provided to eligible children. States and the District of Columbia are reimbursed according to an established "Federal Financial Participation" rate, which is 50 percent for most eligible activities and 75 percent for eligible training activities. To receive federal reimbursements under the Act, the claimant must establish not only the eligibility of the activity, but the eligibility of the child benefiting from that activity. Eligibility for reimbursements under the Act is tied to eligibility for the Aid to Families with Dependent Children (AFDC) program. At least 75 percent of children in the District's foster care are AFDC eligible, yet the CFSD had established eligibility under the Adoption Assistance Act for only 24 percent in July 1987 and 22.6 percent in July 1988. This compares to eligibility rates of 72 percent in New York City, 64 percent in Pittsburgh, 56 percent in Philadelphia, and 50 percent in Montgomery County, Maryland, an affluent suburb of the District of Columbia

In fiscal years 1985 and 1986, the U.S. Department of Health and Human Services (HHS) disallowed 76 percent of the District's claim for $7.8 million in reimbursements under the Act. The HHS report attributed the high rate of disallowance to noncompliance with federal regulations and the department's own policies and procedures. Some of the

claims were disallowed due to the CFSD's failure to obtain court-ordered custody of children who had been in the District's care for more than 180 days. Some were disallowed because children were in homes that did not have current licenses or did not qualify as foster homes. Still others were disallowed because there were no case records for children on whose behalf payments were to be made.

Ms. Meltzer estimated that due to the DHS's failure to properly establish eligibility under the Adoption Assistance Act for all children entering the system, its failure to properly document and claim all allowable training and administrative costs under the Act, and its failure to comply with all of the procedures that must accompany claims, the District is currently losing approximately $14 million a year in potential funding under the Adoption Assistance Act. In addition, it is losing another $7 million per year in Medicaid funding due to its failure to establish and maintain Medicaid eligibility for the children in its care, among other things. In total, Ms. Meltzer and the Center Report conservatively estimate that the District could obtain, at a minimum, an additional $21 million a year in federal reimbursements by ensuring that the proper procedures for making the claims are carried out.[22] Other states have seen even greater increases. According to Ms. Meltzer's testimony, the state of Ohio received $5.8 million in reimbursements in 1984, but after embarking on a concerted program to maximize its revenue assistance, received $52 million in reimbursements in 1990. Similarly, the state of Pennsylvania increased its reimbursements from $43 million in 1984 to $97 million in 1990.

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[22] Although defendants did not offer any expert to rebut Ms. Meltzer's estimates, the Center Report indicates that the Director of Income Maintenance within the department has previously estimated that the District could realize an additional $10 to 12 million in Adoption Assistance Act funds per year by making a number of administrative changes. This estimate is not far from Ms. Meltzer's $14 million estimate.

The Court gives credit to the testimony of Elizabeth Parker, current acting administrator of the FSA, that after federal reviews in 1987, 1988, and 1989, the department was never notified that it was ineligible for federal funding. The Court nevertheless finds, based on Ms. Meltzer's testimony, that the amount of federal funding could have been greatly increased had the department complied more fully with federal laws and regulations and CFSD policy. The Court has listened to defense counsel argue that the District is operating at a severe deficit and that all departments within the city are under stringent budgetary constraints. In essence, defense counsel has argued that compliance with federal and local laws is impossible. The experiences of other states, such as Ohio and Pennsylvania, show that it is not impossible. Moreover, the evidence shows that over a five-year period, by expending a minimal effort, the District could obtain over $100 million in federal funding. The Court finds it disingenuous for the District to blame its inadequacies on a lack of funding when it has failed to obtain the generous funding that is readily available to it.

7. The Proposed Realignment

Throughout defendants' case in chief, the Court was presented with much testimony about a proposed "realignment" that the CFSD is undergoing to better carry out its responsibilities. Evelyn Andrews, chief of the CFSD, testified that the division intends to realign itself in a way that provides for social workers to specialize in certain areas and thereby reduce their caseloads. Ms. Andrews testified that various committees were working on a plan for realignment. Despite the Court's repeated requests for documentation of this alleged plan, the best that defendants were able to provide was a brief proposed organizational chart for the realigned division. This chart indicates that under the division chief would be three deputy chiefs: one for "Prevention and Protection," one for "Foster Care and Adoption," and one for "Operations." Under the deputy chief for Prevention

and Protection would be the "Prevention, Intake and Crisis Services Branch" and the "Child Protective Services Branch." Under the deputy chief for Foster Care and Adoption would be the "Foster Care Services Branch" and the "Adoption Resources Branch." The deputy chief for Operations would be responsible for the Monitoring Unit, the WARD Tracking System, and other administrative functions. No document provided to the Court suggests any time frame for instituting the proposed realignment or any strategy for making it work to reduce caseloads and increase compliance with federal and District law. Nor did Ms. Andrews' testimony provide the Court with any guidance in this regard. Ms. Andrews testified that the plan was not in final form, but that she was aware of some administrative level changes due to take place in the next few weeks. She did not apprise the Court of the details of these changes.

The Court is encouraged that defendants are finally attempting to alleviate some of the deficiencies in the current system. Nevertheless, the Court simply does not have enough evidence detailing the proposed realignment in order to make a finding that the realignment will remedy all of the system's failures, which have been elaborately detailed above. No one has explained how specialization will reduce caseloads or when the specialization is to take place. The court cannot ask plaintiffs to rely on defendants' good faith but as yet unsubstantiated promises to improve.

It is not sheer coincidence that the proposed realignment has been suddenly undertaken in the past few months. Based on the testimony of several of defendants' witnesses, it is clear that many of the District's steps toward improvement were instituted after discovery was largely completed, plaintiffs' experts had completed their reports, and the prospect of a full trial on the merits had become likely. It wasn't until June of 1990, eight months before trial, that the DHS hired someone to set up a training program for social workers, managers, and support staff within the CFSD. It wasn't until

August of 1990, six months before trial, that the DHS established a Recruitment Unit within the CFSD, solely for the purpose of recruiting foster and adoptive homes. It wasn't until November of 1990, three months before trial, that the DHS began hiring social workers on a permanent, rather than temporary, basis. At the time of trial, there was still no concrete evidence that existing social workers had been converted to permanent positions, although the evidence indicated that a conversion was planned. It wasn't until January of this year, a month before trial, that the caseloads of social workers such as Chainie Scott were reduced.[23] It wasn't until the time of trial itself that the chief of the ICSB was asked to prepare a risk assessment tool for use during investigations of neglect reports. The person assigned this task admitted at trial that he was only "a little" familiar with the Child Welfare League standards concerning risk assessment. In short, the Court is concerned that the department's efforts to improve may have been motivated only by this litigation and, without continued litigation or a court order, the motivation for continued restructuring and improvement will subside.[24]

8. Harm to the Children

The Court has found that the DHS has, at least since 1987, consistently failed to comply with the requirements of the federal Adoption Assistance Act, the District's Abuse and Neglect Act, the CFSD Manual of Operations, and reasonable professional standards. Although common sense dictates that these widespread and systemic deficiencies have caused harm to the children in the District's foster care, plain-

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[23] As the Court has previously found, even after the reduction, the caseloads of the CFSD's social workers far exceed any reasonable professional standards and make it impossible for the social workers to effectively carry out their functions.

[24] The Court's concerns are fueled by the fact that no written documentation on the goals, objectives, and methodology of the proposed realignment was supplied to the Court.

tiffs have nevertheless introduced substantial uncontroverted evidence regarding the nature and scope of that harm.

a. Harm to the Named Plaintiffs

Testifying on behalf of plaintiffs were four child psychiatrists. Each had examined one of the named plaintiffs, both personally and through a review of the child's case records. Each had an opinion regarding the harm that had resulted from the child's experience in foster care.

i. LaShawn A.

Dr. Harold Eist, a child psychiatrist who is on the faculty at Howard University and has treated over 5,000 inner city children, offered his opinion about the psychological and emotional stability of LaShawn A. LaShawn came into custody in September 1986, when she was two-and-a-half years old. She was placed in voluntary care by her mother, who was homeless and could not care for LaShawn because of emotional problems. No services were offered to enable her to remain at home. LaShawn was placed in the foster home of a woman in her sixties who had no interest in adopting LaShawn. She had no contact with her natural family for at least two years after she came into care. During this period, a psychiatrist who examined her discovered potential psychiatric problems and developmental delays. She was placed in a therapeutic nursery in the summer of 1987. In November 1988, her mother visited her. In January and February 1989, LaShawn's mother failed to show up for scheduled visits. A subsequent visit from her mother did not go well. In April, she was visited by her father, who had been incarcerated when she entered foster care. LaShawn remained in emergency care status until May 1989, two-and-a-half years after her entry into the District's physical custody. A psychiatric evaluation conducted that month indicated she may have been experiencing an overuse of physical punishment and perhaps even sexual abuse in her foster home. At the time of trial, LaShawn remained in the same foster home.

Dr. Eist examined LaShawn in July 1990. He described her as an attractive, neatly groomed six-and-a-half-year-old who separated easily from the social worker who brought her to his office. He testified that LaShawn was frenetically hyperactive and lost concentration easily. Her developmental delays became evident when she could not play tic tac toe nor draw a straight line. When Dr. Eist asked her who loved her, LaShawn replied "no one." When he asked her who hated her, she said her foster mother. Dr. Eist testified that LaShawn indicated that her foster mother beat her. Dr. Eist concluded that LaShawn suffered from "Attention Deficit Hyperactivity Disorder" (AD-HD), was severely emotionally delayed, and was overwhelmed by stimuli. He opined that her prognosis was grave and that she will likely experience four to six exacerbations of depression throughout her adulthood, lasting anywhere from one to four years each. Although Dr. Eist admitted that the cause of AD-HD is unknown and that there was evidence that LaShawn had psychological problems before entering foster care, he concluded that the mishandling of her case while in custody contributed to her disorders. He testified that LaShawn has benefited from the therapeutic nursery, but that she needs occupational training, additional support services, contact with her siblings, and a decision about her final placement. Dr. Eist opined that had LaShawn been in a caring family who lobbied for services to provide for her special needs, there is a strong likelihood that her AD-HD would not be as severe and her depression would be seriously ameliorated. The longer she remains with her current foster mother, according to Dr. Eist, the less she may be able to benefit from adoptive placement.

ii. Leo C.

Dr. Gordon Kirschner, a child psychiatrist with experience in psychoanalysis and the treatment of children, adolescents, and adults, reviewed the case records of Leo C. and examined him on July 18, 1990. Leo came into custody in 1982 when

he was two-and-a-half months old and his mother was admitted into a psychiatric facility. Although case workers almost immediately determined that Leo should be a candidate for adoption, the department returned Leo to his mother six months after he came into care. Leo's mother then had another baby, her fifth, in the fall of 1983. In May 1984, Leo's mother requested that he and his new brother, Gary, be placed in foster care while she sought psychiatric hospitalization. The children did not come into care, however, but were sent to stay with their maternal grandmother in June 1984. Later that month they were left with a neighbor who called the DHS to have them placed in emergency care. Leo and Gary remained in a foster home until February 1985, when their foster mother requested their removal. The children were returned to their mother. In June 1985, their mother placed them in voluntary care so she could be hospitalized for depression. After she left the hospital, the children were again returned to her. In 1987, the children again came into the District's custody and have remained there ever since. They were in an institution until late 1988, after which they were placed in a foster home. Since May 1989, both children have been on psychoactive medications to control their behavior. Their case goals remain "return home" even though their mother has been uncooperative and has not visited regularly. According to the testimony of Dr. Kirschner, the foster mother caring for Gary and Leo "dropped out of the picture" while they were at camp in the summer of 1989. They have been with their step-grandmother ever since.

Dr. Kirschner described Leo as notably unemotional and unattached to his step-grandmother, even though he had spent the previous 18 months living with her. Dr. Kirschner described him as cooperative, but inclined to change the rules of the games they played in order to suit himself. He testified that Leo suffered from AD-HD and developmental disorders and that Leo had a poorly formed internal representation of other people, including his mother and strangers. Dr.

Kirschner opined that Leo's problems will continue into adulthood. He testified that he believed the frequent changes in Leo's living situation and the inadequacies of Leo's mother had caused many of Leo's difficulties. Had Leo been adopted by the time he was three, Dr. Kirschner opined, he would not have experienced the same disorders. Nevertheless, Dr. Kirschner believes Leo could still benefit from adoption.

iii. Robert D.

Dr. Richard Gross, a child psychiatrist with extensive experience treating children in foster care, reviewed the records of and personally examined Robert D. This child came into care when he was 14 months old after his grandmother filed a report that he had been neglected. He was in foster care from January 25, 1980 until November 6, 1980, when he was returned to his mother. In January and February 1984, the department was notified by Robert's sister's school principal and by the Metropolitan Police Department's Youth Division that the family was in need of assistance. Nothing in the record indicates any visits by the assigned social worker until Robert entered emergency care in July 1985. After his first foster mother beat him, he was placed in a different foster home. He lived in this home from the fall of 1985 until 1988. The goal listed on Robert's April 1987 case plan was adoption. His mother signed an agreement relinquishing parental rights on June 1, 1987, but the agreement was never processed because it apparently was lost. Robert's May 1988 case plan inexplicably listed a goal of family reunification. In December 1988, Robert moved to his fourth foster home, where he remained until September 1989. Robert's April 1989 Disposition Report, written when he was 10 years old, states that his planning goal is long-term foster care. In late 1989, Robert was placed in a group home.

Gross described Robert as being concrete and literal in his thinking, exhibiting poor judgment and little enthusiasm. He testified that Robert had low self-esteem, felt no sense

of belonging, and expressed an unusual fear and distrust of people. Robert refused to draw a picture of a person or play with the doctor's puppets that looked like people. Dr. Gross testified that Robert told him "you can't trust people, they die in front of your face." According to Dr. Gross, Robert suffers from depression, adjustment disorders, and learning disabilities that are likely to follow him into adulthood and prevent him from undertaking normal life activities such as holding down a steady job. Dr. Gross opined that Robert's problems were caused by the early lack of a relationship with his mother and the continuing lack of a relationship with any single caregiving adult. Although Dr. Gross acknowledged that Robert's problems were fairly characteristic of children in foster care, he believed that placement in one continuous and appropriate foster home could have provided Robert with a greater chance of success. Similarly, Dr. Gross testified that he believes that if Robert had been adopted earlier, he would be a more integrated and successful child.

iv. Kevin E.

Dr. William Clotworthy, Jr., a child psychiatrist who was the clinical director for the Christ Child Institute for Children for 15 years, reviewed the records of and personally examined Kevin E. With minor exceptions, Kevin has been in the District's custody for his entire life. He came into custody following his release from the hospital 20 days after he was born. Kevin is now 11 years old. He has been in 11 different placements, including foster homes, group homes, residential treatment facilities, and hospitals. At one time he was in a foster home with his mother, who was also in the District's custody. Kevin was not freed for adoption until he was eight years old. Kevin was hospitalized in 1988 after exhibiting behavior that included running away from home, head banging, suicidal thoughts, auditory hallucinations, and temper tantrums. He told hospital staff that he hated himself and he climbed into a trash can and asked to be thrown away. Kevin was placed in Villa Maria, a residential treatment

facility in Baltimore, Maryland, in the fall of 1988. Reports from the institution in 1989 indicate that he might not be able to tolerate the intensity of a family setting due to his history of abandonment. Although adoption has been Kevin's planning goal for much of his life, his case has never been referred to the Adoption and Placement Resources Branch.

Dr. Clotworthy examined Kevin on July 30, 1990. He described Kevin as engaging, articulate, and cooperative, but with a severe case of AD-HD. According to Dr. Clotworthy, Kevin was easily distracted and frustrated, had poor impulse control, and suffered from mild learning disabilities in the form of speech and language delays. Dr. Clotworthy testified that the record revealed Kevin's low self-esteem and difficulty trusting people. Dr. Clotworthy opined that these conditions are likely to be long-lasting and that Kevin's tendency to react strongly to both hard and medium "bumps along his road" may affect his ability to hold a job. Dr. Clotworthy testified that he believed that the frequent changes in placements were each interpreted by Kevin as being his fault and signifying that something was wrong with him. Each was an enormous blow. Dr. Clotworthy opined that if social workers had been attuned to his special needs earlier, the outcome for Kevin could have been quite different. In Dr. Clotworthy's opinion, Kevin was moved at inappropriate times, was returned to his mother inappropriately, was not prescribed medication early enough (to control his depression and hyperactivity), and was generally not provided with the help he needed to be a success in school or at other endeavors. Dr. Clotworthy testified that any trained social worker should have realized his needs much earlier and realized that there was no chance of returning him to his mother. Dr. Clotworthy expects Kevin to experience regression and an increase in symptoms when he is forced to leave Villa Maria.

b. Harm to the Plaintiff Class

The uncontroverted testimony of Dr. Eist, Professor Walker, Dr. Williams, and other of plaintiffs' experts leads

the Court to find that regular, constant, reliable relationships with adults are critical to the development of children. For children in foster care, regular visits with their social workers, parents, and siblings are crucial if there is to be any chance of reunification. Without such visitation, children are unable to develop a sense of safety, confidence, and trust. If the parents are uncooperative or unwilling to visit regularly and accept parental responsibility, social workers should expeditiously move toward adoption by gathering the necessary materials for terminating parental rights. Prolonged stays in foster care and frequent changes in placements lead to the disorder suffered by the named plaintiffs all too frequently. As Dr. Gross testified, Robert's problems are fairly characteristic of other children in the foster care population. Based on the foregoing, the Court finds that the children in the District's foster care have been and continue to be irreparably harmed—psychologically, emotionally, and sometimes physically—by the inappropriate treatment they have received while in that care.

Those who are not in the District's custody but who have been the subject of reports of neglect have also been harmed. Dr. Stein's case reading contains examples of 11 cases for which reports were substantiated but no services provided. In the most extreme case, a child died after his mother failed to keep him on a heart monitor made necessary by his medical problems. Prior to releasing the child to his mother, the CFSD had been made aware of the mother's lack of contact with the child while he was hospitalized. The homicide detective's report, made after the child's death, noted that the mother's apartment was dirty, without running water, and was littered with drug paraphernalia. The child showed signs of having been choked. In less extreme cases, children are forced to live in filthy, rodent-infested homes that lack electricity or running water. They are often in the presence of drug use and are not fed regular meals. Based on the foregoing, the Court finds that those plaintiffs who have been the

subject of a report of neglect but remain in the home have been and continue to be harmed by the District's failure to provide preventive services.

C. Summary of Findings

To summarize, in the foregoing discussion, the Court found the following:

1. The average stay for children in the District's foster care system is 4.8 years, over twice the national average.

2. The CFSD has, since at least the beginning of 1988, continuously failed to initiate investigations into reports of neglect or abuse within 24 hours and complete investigations within two weeks.

3. The CFSD has consistently failed to use "reasonable efforts" to prevent the removal of children from their homes or to provide the services necessary to reunite them with their families when removal cannot be avoided.

4. Children in the CFSD's physical custody have consistently remained in voluntary or emergency care beyond 90 days without the filing of a neglect petition and beyond 180 days without a judicial determination that placement is in their best interests.

5. The CFSD has consistently failed to place children in the least restrictive placements in close proximity to their families and consistent with their needs.

6. The CFSD has frequently assigned children in its custody inappropriate case goals and has consistently failed to prepare written case plans to enable the children to realize their goals.

7. The CFSD has consistently failed to provide services once children are removed from the home and placed in foster care.

8. The CFSD has consistently failed to expedite the progression of children in its custody toward permanent place-

ment through adoption and has failed to timely refer children whose goal is adoption to the Adoption and Placement Resources Branch.

9. The CFSD has consistently failed to ensure that the children in its custody receive timely judicial and administrative reviews regarding the continued necessity and appropriateness of placement.

10. The CFSD's automated information system, the WARD Tracking System, is wholly inadequate for keeping track of the number and location of children in the District's custody and their needs.

11. The caseloads handled by CFSD social workers have consistently exceeded reasonable professional standards and prevented the CFSD from carrying out its responsibilities under federal and District law.

12. Extreme staff shortages have consistently resulted in CFSD supervisors carrying caseloads rather than training and monitoring their employees.

13. The CFSD's Monitoring Unit has consistently failed to monitor and inspect foster homes and institutions on a yearly basis.

14. The DHS has consistently failed to use its funding in the most cost-effective manner and has consistently failed to maximize its federal funding by failing to make the administrative changes necessary to qualify for such funding.

15. Each of the named plaintiffs, as well as the rest of the members of the plaintiff class, have been and continue to be psychologically, emotionally, and physically harmed by the actions and inactions of defendants.

16. Management personnel at all levels of the DHS, as well as the former mayor, have repeatedly been advised about the department's deficiencies and inability to comply with federal and local law.

17. The DHS's proposed realignment, although a positive step toward improvement, is still too tentative to moot this case or make injunctive relief unnecessary.

III.

CONCLUSIONS OF LAW

Plaintiffs bring their complaint under 42 U.S.C. § 1983, alleging that the District operates its child welfare system in violation of the federal Adoption Assistance and Child Welfare Act of 1980 and Child Abuse Prevention and Treatment Act, as well as the fifth amendment to the Constitution. Plaintiffs also allege that the District is violating its own statutes: the Prevention of Abuse and Neglect Act of 1977 and the Youth Residential Facilities Licensure Act of 1986. Plaintiffs seek injunctive relief only.

Section 1983 of Title 42 of the United States Code provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983.

A. Standard for § 1983 Liability

The seminal case establishing that municipalities may be held liable under § 1983 is *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978).[25] In that case, the Supreme Court held

[25] It should be noted that, although the District of Columbia is not a named defendant in this action, the mayor is named in her official capacity. Because the mayor is, in essence, the individual embodiment of the District, the Court does not find that the failure to name the District as a defendant affects its analysis of the applicability of § 1983.

that although "a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents," it may be held liable "when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury." *Id.* at 694. Defendants argue that the District cannot be held liable unless the alleged unconstitutional action " 'implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by the body's officers.' " Defendants' Trial Brief at 9 (quoting *Monell*, 436 U.S. at 690 (1978)). Defendants ignore the next sentence of the *Monell* decision, however, which makes it clear that "local governments, like every other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decisionmaking channels." 436 U.S. at 690-91. What matters is that the policy or custom is "the moving force of the constitutional violation." *Id.* at 694.

This circuit has elaborated on the *Monell* inquiry, holding that to establish municipal liability under § 1983, a plaintiff must prove the existence of "a persistent, pervasive practice, attributable to a course deliberately pursued by official policy-makers, one that caused the deprivation of constitutional rights plaintiff experienced." *Carter v. District of Columbia, et al.*, 795 F.2d 116, 125-26 (D.C. Cir. 1986). The Court will use this legal standard to review the alleged statutory and constitutional violations in this case.

B. Alleged Statutory Violations

1. Applicability of § 1983

The Supreme Court has repeatedly held that § 1983 provides a federal remedy for violations of federal statutory rights as well as constitutional rights. *See Golden State Transit Corp. v. City of Los Angeles*, —— U.S. ——, ——,

110 S. Ct. 444, 448 (1989); *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980). The test for determining whether § 1983 provides a remedy for any particular statutory violation is two-part: first, "the plaintiff must assert the violation of a federal right," *see Golden State Transit Corp.*, —— U.S. at ——, 110 S. Ct. at 448, and second, Congress must not have specifically foreclosed the § 1983 remedy. *Id. See also Thiboutot*, 448 U.S. at 19. Whether a federal right has been violated depends upon whether the statute in question creates "obligations binding on the governmental unit" that are not " 'too vague and amorphous' to be 'beyond the competence of the judiciary to enforce' " and that are " 'inten[ded] to benefit' the putative plaintiff." *Golden State Transit Corp.* —— U.S. at ——, 110 S. Ct. at 448 (quoting *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 431-32, 430 (1987)).

Defendants have argued that the federal statutes relied upon by plaintiffs merely establish state grant programs and do not create actionable rights under § 1983. This argument is contrary to existing law. In *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983), the First Circuit applied the two-part test to alleged violations of the same statute at issue in this case, the federal Adoption Assistance Act. The court held that the Act confers enforceable rights upon children in the custody of states receiving federal funding under the Act. In so holding, the First Circuit relied on numerous Supreme Court decisions since 1968 that "implicitly and explicitly" have held that the rights under various provisions of the Social Security Act are privately enforceable under § 1983. 719 F.2d at 510 (citing cases). Having determined that the Adoption Assistance Act conferred an enforceable right, the First Circuit went on to determine that Congress had not foreclosed the § 1983 remedy by authorizing the Secretary of the Department of Health and Human Services to withhold or reduce federal funding under the Act when a state does not comply with its requirements. The court rejected the defendants' arguments that a cutoff in funding was the

sole remedy under the Act. Instead, the First Circuit held that the issue was governed by *Rosado v. Wyman*, 397 U.S. 397 (1970), in which the Supreme Court held that:

> We have considered and rejected the argument that a federal court is without power to review state welfare provisions or prohibit the use of federal funds by the States in view of the fact that Congress has lodged in the Department of HEW the power to cut off federal funds for noncompliance with statutory requirements. We are most reluctant to assume Congress has closed the avenue of effective judicial review to those individuals most directly affected by the administration of its program.

397 U.S. at 420.

More recently, the Fourth Circuit upheld the enforceability of the Adoption Assistance Act through § 1938 in *L.J., By and Through Darr v. Massinga*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989). The Fourth Circuit held that the provisions of the Act:

> spell out a standard of conduct, and as a corollary rights in plaintiffs, which plaintiffs have alleged have been denied. It is true that the statutes are largely statutes relating to appropriations, but defendants' argument to the contrary notwithstanding, they are privately enforceable under 42 U.S.C. § 1983.

838 F.2d at 123. The court went on to uphold the district court's grant of a preliminary injunction ordering defendants to "submit a plan for review of foster homes about which a report of maltreatment has been made, to monitor child placements in foster homes at least monthly and in some instances weekly, to expand its medical services to foster children including the keeping of medical records, and to provide prompt written reports of maltreatment of foster children to their attorneys and the juvenile court . . . ." *Id.* at 120. *See also Lesher v. Lavrich*, 784 F.2d 193, 197 (6th Cir. 1986) (holding plaintiffs not entitled to damages for alleged violations of Adoption Assistance Act but agreeing

with *Lynch* that "[i]t may be reasonable to read the [Act] to permit parents and children affected by the programs it funds to sue to force those programs to comply with the federal funding requirements").

This Court finds the reasoning of the First and Fourth Circuits persuasive. It would strain logic to hold that plaintiffs, as the intended beneficiaries of the Adoption Assistance Act, nevertheless are precluded from enforcing their rights under the Act. Moreover, the provisions of the Act itself persuade the Court that the Act creates enforceable rights. These provisions are extraordinarily specific, spelling out exactly what a state must do for children in its care in order to receive funding under the Act. Based on this, the Court holds that the Adoption Assistance Act, by its terms, "creates obligations 'sufficiently specific and definite' to be within 'the competence of the judiciary to enforce,' . . . is intended to benefit the putative plaintiffs, and is not foreclosed 'by express provision or other specific evidence from the statute itself.' " *Golden State Transit Corp.*, ––– U.S. at ––, 110 S. Ct. at 449 (citing *Wright v. Roanoke Redevelopment and Housing Authority*, 479 U.S. 418, 432, 423 (1987)).

2. Defendants' Violations

Having determined that § 1983 is available to enforce rights conferred by the Adoption Assistance Act, this Court must determine whether the District, by virtue of an official policy or custom, has deprived plaintiffs of those rights. The Court has recited countless facts which undeniably establish that plaintiffs are being deprived of rights conferred upon them by the federal statute. In almost every area of the federal law, the District's child welfare system is deficient. It fails to investigate reports of abuse and neglect in a timely manner; it fails to provide services to children and families; it fails to make appropriate foster care placements; it fails to develop case plans; and it fails to assure a permanent home for the children in its care, among other things. The Court has already found that these failures have terrible conse-

quences for the children in the District's custody as well as for those who are known to the District because of reports of neglect or abuse. In one tragic case, these failures resulted in an infant's death. The Court has also found that the upper management of the DHS, as well as the former mayor, have been repeatedly made aware of most, if not all, of the system's failures. At one point, having been repeatedly advised that children were at risk due to severe staff shortages and excessive caseloads, the mayor promised to hire more social workers so that the CFSD could carry out its responsibilities. This promise never materialized.

Defendants have pointed out that the District's official policy is embodied in its statutes, which largely follow the mandates of the Adoption Assistance Act. Although the Court agrees that the District's statutes may be its "official policy," it does not represent the actual practice in the District. The court in *Lynch v. Dukakis*, 719 F.2d 504 (1st Cir. 1983), addressed and rejected a similar argument. In that case, defendants argued that review was precluded because the Massachusetts statute and regulations were consistent with federal law. The court held that § 1983 applies to state "custom or usage" just as it does to state statutes. Therefore, the court held, "[i]f Massachusetts's practice is to deprive foster children of federal statutory rights, even though the state's law on the books requires otherwise, section 1983 is available as a remedy." 719 F.2d at 511. The situation is the same in this case. Based on the overwhelming evidence, the Court can conclude nothing less than that the District's failures amount to a "persistent, pervasive practice, attributable to a course deliberately pursued by official policymakers." *Carter v. District of Columbia, et al.*, 795 F.2d 116, 125-26 (D.C. Cir. 1986). Accordingly, the Court holds that the District has been and continues to be depriving plaintiffs of federal statutory rights in violation of § 1983 of Title 42 of the United States Code.

C. Alleged Constitutional Violations

1. The Need to Reach the Constitutional Claims

Although the Court is mindful of the longstanding admonishment to refrain from reaching constitutional issues unnecessarily, the nature of the relief sought in this case makes a resolution of the constitutional claims of the children in the District's foster care unavoidable. By holding that the District has violated only these children's *statutory* rights, the Court is limited to granting only conditional relief. If the District decides to simply forego federal funding under the Adoption Assistance Act, the Court would have no basis for enforcing any injunction it might order. This limitation was noted by the district court in *Lynch v. King*, 550 F. Supp. 325 (D. Mass. 1982), *aff'd*, *Lynch v. Dukakis*, 719 F.2d 504 (lst Cir. 1983). In that case, the court issued a preliminary injunction ordering the state to provide written case plans, ordering a cap on the number of cases a social worker can have at any time, and ordering other specific relief. The district court noted, however, that the relief was limited to "an order compelling state officials to give up some of those resources—funds appropriated by Congress—if federal requirements are not met." 550 F. Supp. at 327.[26] *See also Rosado v. Wyman*, 397 U.S. 397, 420 (1970) (holding that plaintiffs who challenged the state's plan for making

[26] Despite the limit of this relief, the court in *Lynch* chose not to address plaintiff's constitutional claims at that time. It held, however, that "[i]f defendants choose not to participate in the program for supplemental funds . . ., or fail to submit a revised plan demonstrating their compliance with the requirements of [the Act], they will be restrained from spending supplemental funds allotted under [the Act]. In addition, plaintiffs may apply to the court for a hearing on their constitutional claims." 550 F. Supp. at 354. Unlike this case, which has proceeded through a full trial on the merits, the decision in *Lynch* was made at the preliminary injunction stage, after which the parties entered into a settlement.

In the more recent decision in *L.J. By and Through Darr v. Massina*, No. 84-4409 (July 27, 1987) (reprinted as Addendum B to *L.J. By and*

[Footnote continued on next page]

payments pursuant to the federal Aid to Families with Dependent Children program were entitled to declaratory relief and an appropriate injunction against the payment of federal monies if the state did not develop a plan that conformed with the statute in a reasonable amount of time, but noting that the state is free to use only state funds according to whatever plan it chooses, providing it does not violate the Constitution).

If this Court orders relief for the District's statutory violations only, the District could simply give up its federal payments in order to relieve itself of a burdensome court order. Plaintiffs would then be left with no effective relief. Because the Court may grant only conditional relief for defendants' statutory violations, the Court will proceed to reach plaintiffs' constitutional claims.

2. The Legal Standard

Plaintiffs allege that they are being deprived of their due process rights under the fifth amendment, including: (1) the right not to be harmed while in state custody, (2) the right to placement in the least restrictive, most appropriate placement, (3) the right to care that is consistent with competent professional judgment, and (4) the right not to be deprived of state or federally created liberty or property rights without due process. Complaint at ¶ 130. As the Court has previously articulated, to establish a constitutional violation under § 1983, plaintiffs must prove that the alleged unconstitutional

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Through Darr v. Massina, 699 F. Supp. 508 (1988)), *aff'd*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989), the Maryland district court was not so reluctant to address the constitutional issues at the preliminary injunction stage. That court first established that defendants, including the Baltimore City Department of Social Services (BCDSS), had a constitutional duty to protect the children in the city's foster care custody. The court then held that due to the "systemic nature of the BCDSS failure to perform that duty," the plaintiffs were likely to succeed on the merits of their constitutional claims. Slip op. at ——, 699 F. Supp. at 539-40.

action amounts to an official policy or custom and that a causal link exists between the policy or custom and the alleged harm. *See Monell v. Dep't of Social Services*, 436 U.S. 658, 694 (1978); *Morgan v. District of Columbia*, 824 F.2d 1049, 1058 (D.C. Cir. 1987); *Carter v. District of Columbia, et al.*, 795 F.2d 116, 125-26 (D.C. Cir. 1986).

Before the Court can apply this standard to the facts of this case, it must determine whether defendants' actions or nonactions are indeed unconstitutional. This issue has never been conclusively determined by any of the district courts or circuits that have entertained similar child welfare suits.

The biggest obstacle to plaintiffs' constitutional claims is the case of *Deshaney v. Winnebago County Dept of Social Services, et al.*, 489 U.S. 189, 109 S. Ct. 998 (1989). The case involved a young boy who was not in the state's custody but had been brought to the state's attention through reports of abuse. After the state social services agency became aware of the boy and established a "Child Protection Team" to recommend measures for his protection, the boy's father beat him so severely that he will require institutionalization for the rest of his life. The boy's mother sued under § 1983 on his behalf, arguing that the state had acquired a duty to protect her son because it knew of the danger of abuse to him and had undertaken efforts to provide for his protection. Having entered this "special relationship" with the boy, the mother argued that the state had a duty to protect him competently.

The Supreme Court rejected these arguments, holding that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." 489 U.S. at ——, 109 S. Ct. at 1003. The Court reiterated its prior holdings that the due process clause does not confer an affirmative right to governmental aid. *See Youngberg v. Romeo*, 457 U.S. 307, 317 (1982); *Harris v. McRae*, 448 U.S. 297, 317-18 (1980); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

Deshaney is distinguishable from the case at bar for two reasons. First, the Court in *Deshaney* acknowledged that "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being." 489 U.S. at ——, 109 S. Ct. at 1005. The Court continued by noting that "[h]ad the State by the affirmative exercise of its power removed Joshua from free society and placed him in a foster home operated by its agents, we might have a situation sufficiently analogous to incarceration or institutionalization to give rise to an affirmative duty to protect." *Id.* at —— n.9, 109 S. Ct. at 1006 n.9. Clearly this is the situation for the plaintiffs in this case who have entered into the District of Columbia's custody.

The second distinguishing factor is that the plaintiffs in this case argue that the District's statutes and policies create constitutionally protected liberty and property interests. The District's violation of these statutes and policies, so their argument goes, violates the due process rights of the children in foster care. This argument was not considered by the Supreme Court in *Deshaney* because it had not been pleaded in the courts below. *See* 489 U.S. at —— n.2, 109 S. Ct. at 1003 n.2 (noting that the entitlement argument was made for the first time in petitioners' Supreme Court brief and thus declining to consider it). Whether either of these distinguishing factors opens the door to holding the District liable for constitutional violations depends upon the scope of plaintiffs' liberty interests and the scope of the defendants' duty to prevent the deprivation of those interests.

a. Scope of Plaintiffs' Liberty Interests

Plaintiffs' Constitutional claims are brought pursuant to the fifth amendment to the Constitution, which is applicable to the District of Columbia in the same way as the fourteenth amendment is applicable to the states. The fifth amendment protects persons from being deprived of liberty interests

without due process of law. Plaintiffs have asserted that they have liberty interests in freedom from harm while in state custody, placement in the least restrictive, most appropriate foster care placements, and receiving care that is consistent with competent professional judgment.

It is indisputable that plaintiffs have a liberty interest in safe conditions while in state custody. Even convicted criminals subject to state or federal punishment have an interest in their physical security. *See Hutto v. Finney*, 437 U.S. 678 (1978). Although the scope of plaintiffs' liberty interest is not entirely clear, the Supreme Court has indicated that it is broader for those in the civil custody of the state than for those in the state's criminal custody.

In *Youngberg v. Romeo*, 457 U.S. 307 (1982), plaintiff, an involuntarily committed mentally retarded adult, complained that he had suffered repeated injuries and had been subjected to physical restraints while in the state's custody. The Supreme Court held that the plaintiff had liberty interests in reasonably safe conditions and freedom from bodily restraint. *Id.* at 315-16. The Supreme Court then turned to plaintiff's claim that he had a right to minimal training in the development of necessary skills. The Court noted that although a state has no general constitutional duty to provide substantive services to its citizens, *see Harris v. McRae*, 448 U.S. 297, 318 (1980), *Maher v. Roe*, 432 U.S. 464 (1977), a duty may arise when a person is in the state's custody and is dependent upon the state for care. *Youngberg*, 457 U.S. at 317. The Supreme Court then held that the plaintiff's liberty interests "require the State to provide minimally adequate or reasonable training to ensure safety and freedom from undue restraint." *Id.* at 319. The Court did not need to resolve "the difficult question whether a mentally retarded person, involuntarily committed to a state institution, has some general constitutional right to training *per se*, even when no type or amount of training would lead to freedom." *Id.* at 318 (footnote omitted).

The Court finds the rights of children in foster care to be analogous to the rights of the involuntarily committed. That is, they have a right to reasonably safe placements in which they will not be harmed.[27] This right is not limited to safety from physical harm, although there are certainly instances in which the plaintiffs in this case have been physically harmed. This right extends to safety from psychological and emotional harm. *See Carey v. Piphus*, 435 U.S. 247 (1978) (mental and emotional distress is a cognizable injury under § 1983). *See also Deshaney*, 489 U.S. at ——, 109 S. Ct. at 1005 (once in custody, state has constitutional "duty to assume some responsibility for [a child's] safety and general well-being"). Whether plaintiffs have a liberty interest in any specific services is a more difficult question, analogous to the question of training addressed by the Supreme Court in *Youngberg*. In addressing this question, it is important to keep in mind that plaintiffs did not come into the District's care by choice. They are wards of the District who rely wholly on the District to provide them with all of life's necessities. They are children

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[27] This holding is supported by the decisions of the District Court of Maryland and the Fourth Circuit. In *L.J. By and Through Darr v. Massina*, No. 84-4409 (July 27, 1987) (reprinted as Addendum B to *L.J. By and Through Darr v. Massina*, 699 F. Supp. 508 (1988)), *aff'd*, 838 F.2d 118 (4th Cir. 1988), *cert. denied*, 488 U.S. 1018 (1989), the district court held that the defendants, including the Baltimore City Department of Social Services, had entered into a "special relationship" with the children in the city's foster care custody. By virtue of this special relationship, defendants had acquired an affirmative duty to protect the plaintiff foster children. The court went on to hold that the systemic nature of defendants' failure to carry out its duty warranted preliminary injunctive relief.

On appeal, the Fourth Circuit held it unnecessary to reach the merits of plaintiffs' constitutional claims but it noted that "[d]efendants do not seriously contend with respect to prospective relief that if plaintiffs prove their allegations, which they have already demonstrated have an arguably solid foundation, plaintiffs will have proven a violation under the Fourteenth Amendment." 838 F.2d at 122. Plaintiffs in *L.J.*, like the plaintiffs in this case, had alleged that systemic deficiencies in the city's foster care system violates the Adoption Assistance Act and the Constitution and resulted in irreparable harm to the city's foster children.

and rely on the District to protect them from harm and ensure their well-being. To the extent that certain services, such as appropriate placements and case planning, are essential to preventing harm to the children in the District's custody, this Court holds that the children have a constitutional liberty interest in those services. This delimitation of the scope of plaintiffs' liberty interest is consistent with the decision in *Youngberg*, wherein the Supreme Court limited the plaintiff's liberty interest in training to just that training necessary to ensure his safety and freedom from bodily restraint.

Plaintiffs' interests also derive from the District's own statutes and regulations, which provide precise directives to the DHS for the operation of its child welfare system. To the extent these statutes and regulations confer benefits upon the plaintiffs in the District's foster care, the deprivation of those benefits takes on constitutional dimensions. In *Board of Regents of State Colleges v. Roth*, 408 U.S. 564 (1972), the Supreme Court held that the requirements of procedural due process apply to deprivations of liberty and property interests. According to the Court, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.*

The Eleventh Circuit relied in part on *Roth* to reverse a district court's dismissal of a foster child's § 1983 complaint in *Taylor by and Through Walker v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989). In that case, the appellate court determined that the Georgia statutes regarding foster care and placement conferred benefits upon children in the care of the state. Specifically, the court held that

> [T]he Georgia scheme mandates that officials follow guidelines and take affirmative actions to ensure the

> well being and promote the welfare of children in foster care. These children can state a claim based upon deprivation of a liberty interest in personal safety when the officials fail to follow this mandate.
> . . .
>
> It is no moment that the state officials are not charged in this case with affirmatively acting to harm this child. What the child is entitled to is the state's protection from harm. She is entitled to be protected in the manner provided by statute. It would be anomalous if the state, in allegedly acting to protect the child, could itself cause harm to the child by failing to assume the child's minimal safety. Failing to act may, under certain circumstances, be more detrimental than acting.

818 F.2d at 799-800. The Georgia statutes at issue in *Taylor* provided a comprehensive scheme governing the state's foster care system. The District's statutes are also comprehensive, requiring the following, among other things: investigations of neglect within 24 hours, D.C. Code Ann. § 6-2102(b); preparation of a plan for each child and family for whom there is a substantiated report of neglect, *id.* at § 6-2107; limited 90-day stays in emergency placement, *id.* at § 6-2123; placements in the "least restrictive" settings, "consistent with the best interest and special needs of the child," CFSD Manual of Operations at § 602.5(a); and the licensure and yearly inspection of youth residential facilities, including foster homes, D.C. Code Ann. at § 3-802(1). *See also* part I, *supra* (outlining mandates of federal and District statutes).

The Eleventh Circuit's reasoning in *Taylor* provides compelling support for this Court's definition of the scope of the liberty interests of the plaintiffs who are in the District's foster care custody. The Court is reluctant, however, to rely wholly on the District's statutes as the source of constitutional liberty interests for those plaintiffs who are not in the District's custody.[28] The Court recognizes that this issue was

[28] Although many of the plaintiffs in this case are in the District's custody, others remain in the home or in the care of friends or relatives
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explicitly left open by the Supreme Court in *Deshaney v. Winnebago County Dep't of Social Services, et al.*, 489 U.S. 189, 109 S. Ct. 998 (1989), which made it clear that the state does not have a general constitutional duty to protect the liberty interests of children who are not in its custody. Without further guidance, the Court is unwilling to hold that the District has acquired such a duty solely by virtue of its own statutes and regulations. Nevertheless, it is without question that the District has neglected its *statutory* duties, under both federal and local law, to all of the children in the plaintiff class, including those who are not in the District's foster care custody.

b. Scope of Defendants' Constitutional Duty

In *Youngberg v. Romeo*, 457 U.S. 307 (1982], the Supreme Court held that determining whether the plaintiff's constitutional rights have been violated requires balancing the plaintiff's liberty interests against any relevant state interests, including fiscal constraints and administrative burdens. *Id.* at 321. The standard for conducting this balancing is not whether the state's interest is "compelling" or "substantial,"

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after having been the subject of a report of abuse and neglect. The plaintiff class is defined as:

> All children who, as the result of alleged or suspected abuse or neglect, are in the legal and/or physical custody of the District of Columbia Department of Human Services; and the presently-identifiable children who are not in the Department's legal or physical custody but who have been the victims, or are at risk, of negect or abuse of which the Department knows or should know as a result of notice to or filings with the Department; not including, however, any member of the class certified in *Bobby D. v. Barry*, Civil Action Misc. No. 16-77 (D.C. Super. Ct. July 7, 1980), who remains in the foster-care custody of the Department of Human Services, with respect to those issues addressed by the judgment entered in that action.

LaShawn A. et al. v. Barry, et al., No. 89-1754, Order Granting Class Certification (January 22, 1990).

but whether the state exercised professional judgment in choosing what action to undertake. It is not for the court to " 'specify which of several professionally acceptable choices should have been made.' " *Id.* at 321 (quoting the Third Circuit's opinion in the same case, 644 F.2d 147, 178 (3d Cir. 1980)). Rather, "liability may be imposed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment." *Id.* at 323. Under this standard, the Constitution places a duty upon state agencies to exercise professional judgment when carrying out their responsibilities. The Supreme Court acknowledged in a footnote that expert testimony may be relevant for determining whether an agency's decisions substantially depart from the requisite professional judgment. *Id.* at 323 n.31.

The *Youngberg* case began its journey to the Supreme Court when the district court instructed the jury that they could hold defendants liable only if they found defendants to be "deliberately indifferent" to the serious medical and psychological needs of the plaintiff. This "deliberate indifference" standard was adopted by the Supreme Court in *Estelle v. Gamble*, 429 U.S. 97 (1976), a case involving prisoners' rights to be free from "cruel and unusual" punishment under the eighth amendment. After the jury found defendants liable, the case was appealed to the Third Circuit, which reversed and remanded, holding that the eighth amendment standard was inapplicable. The Third Circuit, however, could not agree on the appropriate standard for review. Recognizing the importance of this question, the Supreme Court granted certiorari. The Supreme Court then adopted the "professional judgment" standard set forth above, holding that the district court had erroneously instructed the jury on the eighth amendment deliberate indifference standard.

Since *Youngberg*, two circuits have had the occasion to consider the two standards in the context of cases involving children in state custody. In *Doe v. New York City Dept. of Social Services*, 649 F.2d 134 (2d Cir. 1981), *after remand*, 709 F.2d 782 (2d Cir.), *cert. denied sub nom., Catholic Home Bureau v. Doe*, 464 U.S. 864 (1983), the Second Circuit reversed the district court's grant of a J.N.O.V. after a jury returned a verdict in favor of a plaintiff who had been physically and sexually abused by her foster father. The Second Circuit held that government officials could be held liable under § 1983 for inaction, as well as for affirmative action, in violation of law. In its first decision, prior to the Supreme Court's decision in *Youngberg*, the Second Circuit held that deliberate indifference was a prerequisite to § 1983 liability, 649 F.2d at 141. In its second decision, after remand and after *Youngberg*, the Second Circuit acknowledged that the Supreme Court had articulated a different standard for institutionalized plaintiffs. Because the appeal had been brought by the defendants, however, the court did not have to determine which standard to apply. The court instead noted that "[e]ven if the [*Youngberg*] standard of liability is applicable outside of an institutional setting, it is not more favorable to the [defendants] than the deliberate indifference test that was applied . . . . Consequently, we reject the [defendants'] assertion that the [*Youngberg*] decision has effected a change in the controlling law so as to make our prior decision clear error . . . ." 709 F.2d at 790. Because the Second Circuit was not presented with an opportunity to decide whether *Youngberg* applies to children in foster care, this Court does not find its decision controlling.

In *Taylor By and Through Ledbetter*, 818 F 2d 791 (11th Cir. 1987) (*en banc*), *cert. denied*, 489 U.S. 1065 (1989), decided well after *Youngberg*, the Eleventh Circuit again applied the deliberate indifference standard to a § 1983 case involving a child in foster care. The court, in reversing in part the lower court's dismissal of the complaint, held that a child in foster care may prevail under § 1983 "only where it is alleged and

the proof shows that the state officials were deliberately indifferent to the welfare of the child." 818 F.2d at 797. At the same time, the Court acknowledged the similarities between the liberty interests of a child in foster care and the liberty interests of the plaintiff in *Youngberg*. The court specifically declined to address the merits of the child's claim, stating that "[w]hether the child's claim constitutes a liberty interest protected by the due process clause when weighed against the demands of society will be determined at later stages in these proceedings." 818 F.2d at 795. This Court finds the *Taylor* opinion to be ambiguous. Because the Eleventh Circuit did not explain the relationship between the *Youngberg* standard and the "deliberate indifference" standard, the Court finds little guidance in its decision.

Faced with no clear precedent, it is for this Court to determine whether the *Youngberg* professional judgment standard applies to children in the state's foster care custody. The Court finds plaintiffs in this case to be in a much closer position to the plaintiff in *Youngberg* than to an incarcerated prisoner. As the *Youngberg* decision recognizes, the rights of a person in the civil custody of the state are greater than the rights of a person in the state's criminal custody. The foster children that make up the plaintiff class in this case have done society no wrong and they deserve no punishment. It would be inappropriate to force them to endure constitutional deprivations absent a showing of "deliberate indifference" by their caretakers. At the same time, it would be inappropriate to hold caretakers liable for constitutional deprivations when those caretakers had exercised their professional judgment in determining the best course of conduct. Thus, this Court will judge the defendants' liability based on whether they have exercised competent professional judgment in the administration of the District's child welfare system.[29]

[29] The Court is also persuaded to reach this conclusion based on the nature of this case. This is not a case like *Doe* or *Taylor* in which the plain-

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3. Defendant's Violations

The Court has held that the plaintiffs in the District's foster care have liberty interests in personal safety and freedom from harm. The facts of this case establish beyond any doubt that defendants have failed to protect these plaintiffs from harm—whether physical, psychological, or emotional—by failing to place plaintiffs appropriately, failing to prepare case plans, failing to monitor placements, and failing to ensure permanent homes, among other things. Plaintiffs have established these failures in the same way they established defendants' statutory violations: through the experts' reports and testimony, the histories of the named plaintiffs, various DHS documents and reports, the testimony of high-level DHS officials, and the defendants' own admissions.

The defendants have admitted that, for certain periods of time, up to 75 percent of the children in voluntary or emergency care had been in that status for longer than 90 days without the filing of a neglect petition. This status is a form of legal limbo, in which children are suspended with no efforts made to reunite them with their families or to place them in permanent adoptive homes. The defendants have admitted that the CFSD's social workers are unable to closely monitor families or make regular visits to the children for whom they are responsible. This widespread deficiency contributes to the CFSD's perpetual state of crisis. The defendants have admitted that the CFSD does not have adequate medical screening facilities for children coming into its care. The risk of harm to these children, as well as to those

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tiff seeks money damages. In such cases, a deliberate indifference standard may be warranted due to the chilling effect that an unfavorable judgment may have on municipal policymakers. Plaintiffs in this case seek injunctive relief only. In seeking such specific relief, it is particularly appropriate to consider whether the treatment plaintiffs are currently receiving is the result of competent, professional decisionmaking.

they may be placed with, is unacceptable. The defendants have admitted that the CFSD often fails to refer children for adoption even when all hope for family reunification is gone. In at least one case, the CFSD lost a relinquishment agreement, signed by a neglected child's natural mother, that would have freed the child for adoption and paved the way for a permanent family. That child remains in the District's custody. The defendants have admitted that the CFSD has no reliable automated means of tracking the location of children in its care. When a child is referred for placement, a social worker must start calling foster homes to determine whether they have a vacancy. The defendants have admitted that the CFSD does not regularly inspect the foster homes and institutions in which its wards are placed. This failure has no doubt contributed to the instances of physical abuse that the evidence has shown to occur within some of these facilities.

In the Court's view, the defendants' own admissions have established their liability. That the system's outrageous deficiencies may be the result of staff shortages and excessive caseloads is no help to defendants, whose knowledge of these problems and refusal to take action confirm that the problems are not isolated incidents, but amount to "a persistent, pervasive practice." The behavior of the defendants also confirms that the decisions made by officials within the DHS have not been the result of the exercise of professional judgment. Plaintiffs' experts, whose testimony was uncontroverted, established that the District has failed to comply with reasonable professional standards in almost every area of its child welfare system. The testimony of defendants' own witnesses, several of which are named as defendants, often did little more than support this conclusion. Their candidness in admitting the system's failures makes it all the more clear that these failures are not the result of choosing among

several professionally acceptable alternatives. These failures are the result of making no choices at all.[30]

Under *Youngberg*, if defendants have exercised professional judgment in carrying out their constitutional duties, the Court is to balance plaintiffs' liberty interests against any relevant state interests. In this case, however, the Court has determined that defendants have failed to exercise professional judgment almost as egregiously as they have failed to carry out their constitutional duties. Because of this, defendants' arguments about fiscal constraints are unavailing. The Court is well aware of the District's financial plight, but this cannot relieve the District of liability for depriving the children in its foster care of their constitutionally protected liberty interests.

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[30] The Court notes that although it has applied the professional judgment standard to this case, the result would have been the same had it used the deliberate indifference standard. The evidence clearly establishes that the Barry Administration was aware since at least 1987 of the serious deficiencies in the child welfare system. Despite this knowledge, the administration did virtually nothing to improve the dire situation within the CFSD. The former mayor was warned that children were at risk due to the lack of social workers and the excessive caseloads those workers handled. At the time of trial, the CFSD was still barely over half-staffed and social workers still carried caseloads well in excess of professional standards and the division's own policy. The former mayor was warned that the CFSD lacked an information system capable of tracking the number and location of children in its care. At the time of trial, the CFSD had no new system capable of tracking this essential information. The former mayor was informed that the District was losing millions in federal financing due to administrative and procedural shortcomings. At the time of trial, the CFSD had not instituted any program for maximizing federal revenues and continued to forgo millions in federal reimbursements. The list could go on and on, with each of the District's shortcomings representing another failure in its duty to protect the children in its care. The lack of action by the Barry Administration to remedy the system's defects and properly provide for the plaintiff children represents no less than deliberate indifference toward the constitutional rights of these children. That the new mayor and her administration may have the intent to institute reforms cannot alter this conclusion unless that intent is transformed into concrete action or, at the very least, a concrete plan for action.

The Court also concludes that plaintiffs have established the causal link between defendants' constitutional violations and the injuries suffered by the District's foster care children. The testimony and reports of Dr. Stein and plaintiffs' other experts demonstrate that most of the children in foster care will acquire or exacerbate permanent psychological disorders such as the "Attention Deficit Hyperactivity Disorder" exhibited by each of the named plaintiffs who was examined. The case histories of the named plaintiffs reveal the emotional harm these children have suffered, to the point of attempting suicide, by virtue of the failure of the system to either reunite them with their families or find them adoptive families who will care for them. The case histories also reveal the physical abuse these children have endured by virtue of the system's failure to provide for their safety. This is not a case of attempting to protect plaintiffs' interests and failing; this is a case where all too often no attempt is ever made. The Court views the evidence in this case as nothing less than outrageous. The District's dereliction of its responsibilities to the children in its custody is a travesty. Although these children have committed no wrong, they in effect have been punished as though they had. Based on the foregoing, the Court holds that defendants have deprived the children in the District's foster care of their constitutionally protected liberty interests in violation of § 1983.

IV.

CONCLUSION

The Court has thoroughly reviewed the evidence before it and has carefully examined the law. Whatever the limits of the District's ability to provide for the children in its custody, it is clear that the District is statutorily and constitutionally compelled to do more than it is doing now. For these reasons and all of the reasons in the preceding discussion, the Court holds that defendants have violated § 1983 of Title 42 of the

United States Code by depriving plaintiffs of their statutorily and constitutionally conferred rights.

DATED: APRIL 18, 1991

/s/ Thomas F. Hogan

THOMAS F. HOGAN
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1992

No. 91-7159
CIVIL ACTION No. 89-1754

LASHAWN A., BY HER NEXT FRIEND
EVELYN MOORE, *et al.*

v.

SHARON PRATT DIXON, *et al.*,
Appellants.

Before: MIKVA, *Chief Judge;* SENTELLE AND RANDOLPH, *Circuit Judges.*

ORDER

Upon consideration of appellants' petition for rehearing, filed May 13, 1993, it is

ORDERED, by the Court, that this petition is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

FILED: AUGUST 9, 1993

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1992

No. 91-7159
CIVIL ACTION NO. 89-1754

LASHAWN A., BY HER NEXT FRIEND
EVELYN MOORE, *et al.*

v.

SHARON PRATT DIXON, *et al.*,
Appellants.

Before: MIKVA, *Chief Judge;* WALD, EDWARDS, RUTH B. GINSBURG, SILBERMAN, BUCKLEY, WILLIAMS, D. H. GINSBURG, SENTELLE, HENDERSON, and RANDOLPH, *Circuit Judges.*

ORDER

Appellants' Suggestion For Rehearing *En Banc* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not vote in favor of the suggestion. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

Per Curiam
For The Court:

RON GARVIN, *Clerk*

/s/ BY: Robert A. Bonner
ROBERT A. BONNER
Deputy Clerk

Circuit Judges Buckley and Williams would grant the suggestion solely for the purpose of certifying to the District of Columbia Court of Appeals the issue of whether District of Columbia law provides a private right of action in this case.

Circuit Judge Ruth B. Ginsburg did not participate in this matter.

FILED: AUGUST 9, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 89-1754

LASHAWN A., *et al.*
Plaintiffs,

v.

SHARON PRATT DIXON, *et al.*,
Defendants..

ORDER

On August 26, 1991, the Court conducted a fairness hearing on the parties' Joint Motion for Entry into Judgment of Remedial Order. The Court heard testimony from the legal representatives of several class members as well as experts in the field of child welfare and social work. The Court considered the comments proposed by the interested parties, both orally and in writing. In accordance with the findings of fact and conclusions of law set forth by the Court at the hearing, and incorporating the Court's Memorandum Opinion of April 18, 1991, it is this 26th day of August, 1991,

ORDERED that the parties' motion be and hereby is GRANTED and the Court enters into judgment the Proposed Remedial Order submitted by the parties on August 14, 1991.

/s/ Thomas F. Hogan
THOMAS F. HOGAN
United States District Judge

FILED AUGUST 27, 1991

93-924

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-

In the Supreme Court of the United States

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Statutory Appendix to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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In the Supreme Court of the United States

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Statutory Appendix to
Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

TITLE 3

CHAPTER 8. YOUTH RESIDENTIAL FACILITIES LICENSURES.

D.C. Code § 3-801. Definitions.

For the purposes of this chapter, the term:

* * *

(3) "Court" means the Superior Court of the District of Columbia. . . .

D.C. Code § 3-808. Enforcement and penalties.

* * *

(d) (1) Notwithstanding the availability of any other remedy, a resident, any person acting on or in behalf of a resident, or the licensee or administrator of a facility may bring an action in court for mandamus to order the Mayor, a District government agency, or the youth residential monitoring committee to comply with this chapter, a rule issued pursuant to this chapter, or any other District law relevant to the operation of the facility or the care of its residents.

(2) Any person bringing an action under paragraph (1) of this subsection shall give the named defendant(s) at least 5 days advance notice (excluding Saturdays, Sundays, and legal holidays) before the action is filed in court.

TITLE 6

CHAPTER 21. CHILD ABUSE AND NEGLECT.

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Subchapter I. Reporting Abuse and Neglect.

D.C. Code § 6-2101. Definitions.

For the purposes of this act:

* * *

(3) Except where used in Title IV of this act, "Division" means the Child Protective Services Division of the District of Columbia Department of Human Services.

* * *

(5) "Police" means the Metropolitan Police Department of the District of Columbia.

(6) "Report" means a report to the police or the Division of a suspected or known neglected child.

* * *

(8) "Supported report" means a report, made pursuant to § 2-1353, which is supported by credible evidence.

(9) "Unsupported report" means a report, made pursuant to § 2-1353, which is not supported by credible evidence.

D.C. Code § 6-2102. Handling of reports — By Division.

(a) Upon the receipt of an oral report, the Division shall immediately inform the police of the contents of the report, if it alleges a child is or may have been an abused child.

(b) The Division shall commence an investigation of all reports alleging neglect other than abuse within 24 hours of the receipt of the report except that when:

(1) A report alleges that a child is left alone or with inadequate supervision, the Division shall commence an investigation immediately. If the Division is unable to dispatch a worker to the child forthwith, it shall inform the police of the report;

(2) A report indicates the existence of an immediate danger to a child and the immediate removal of the child from his or her surroundings appears necessary despite the available resources, the Division shall inform the police of the contents of the report and request the police to investigate. The Division shall immediately commence a social investigation. . . .

D.C. Code § 6-2103. Same — By police.

* * *

(c) The police shall immediately after a report is received commence an investigation of the circumstances alleged in the report. . . .

D.C. Code § 6-2105. Removal of children.

(a) In cases in which a child is alleged to be a neglected, but not an abused, child the Division shall determine whether the child should be removed from the home or can be protected by the provision of services or resources. If in the opinion of the Division the available services or resources are insufficient to protect the child and there is insufficient time to petition for removal, the Division shall request the police to remove the child pursuant to §16-2309 (3) or (4).

(b) In all cases for which the police are responsible for the initial investigation but which do not involve an immediate danger to a child, the police shall seek from the Division and the Division shall provide assistance in the determination of whether the child can be protected by the provision of services or resources or whether removal is necessary. Whenever possible the Division shall dispatch a worker to the scene to provide assistance in this determination. . . .

Subchapter III. Child Protective Services Division.

D.C. Code § 6-2121. Establishment and purposes.

(a) There shall be maintained within the Department of Human Services a separate and distinct Division. The Division shall have as its purposes and functions:

(1) Safeguarding the rights and protecting the welfare of children whose parents are unable to do so;

(2) Offering highly specialized diagnostic and treatment services to families when there is specific harm to the child's physical or emotional well-being;

(3) Ensuring that neglected and abused children are protected from further experiences and conditions detrimental to their healthy growth and development; and

(4) Providing services on behalf of the child designed to help parents recognize and remedy the conditions harmful to the child and to fulfill their parental roles more adequately.

(b) The Division shall have no other function which is not directly related to its child protective service purpose, except

that the 24-hour intake unit may on an emergency basis, after normal office hours, offer crisis assistance to adults.

(c) The Department of Human Services shall support the purpose and function of the Division by obtaining substitute care for a child whose parents are unable, even with available help, to meet the child's minimum needs and, where appropriate, by providing to the family of such child services which are aimed at reuniting the family as quickly as possible.

D.C. Code § 6-2123. Duties and responsibilites.

(a) The Chief of the Division shall have the following duties and responsibilities, any of which may be contracted for with private or other public agencies:

(1) To receive and investigate reports of neglect as provided in § 103 of this act, and §§ 6-2102 and 6-2104 and to assist in the determination of the need for the removal of an abused child as provided in § 6-2105;

(2) Within 90 days of taking a child into custody pursuant to paragraph (1) of subsection (c) of § 6-2124, to return the child to the home or to request the filing of a neglect petition in the Family Division of the Superior Court of the District of Columbia; [and]

(3) To maintain a program of treatment and services for families of neglected and abused children. . . .

D.C. Code § 6-2124. Services authorized; custodial placement; removal of child.

(a) When an investigation made pursuant to §§ 6-2102 and 6-2103 indicates that a child is an abused or neglected child and in need of services, the Chief of the Division is authorized to provide or secure any necessary services which may include:

(1) Emergency financial aid;

(2) Temporary 3rd-party placement with responsible neighbors or relatives for the child and his or her siblings: Provided, that the person with whom the child is placed shall not be considered an agent of the Department of Human Services;

(3) Emergency caretaker(s) who enter the home and provide temporary care for the child and his or her siblings in appropriate cases, when the consent of the parent or other custodian cannot be obtained, notwithstanding the provisions of the Act of March 3, 1901, as amended (31 Stat. 1324);

(4) The placement of homemakers in the home to maintain the child and his or her siblings or to assist the parent or other caretaker in discharging his or her responsibilities to the child;

(5) Day care for the child and his or her siblings;

(6) Counselling services for the child and his or her family;

(7) Medical evaluation and/or emergency treatment of the child by a qualified physician; and

(8) Other appropriate services or resources available in the community.

(b) When an investigation indicates that a child has been left alone or with inadequate supervision and a 3rd-party placement cannot be made, the Division is authorized to make a temporary custodial placement of the child: Provided, that:

(1) Notice is left for the parent or custodian which shall state the procedure for reclaiming the child;

(2) Efforts continue to locate the parent;

(3) The child is returned forthwith upon the request of the parent or custodian, unless there is additional evidence of immediate danger to the child and police action is taken pursuant to § 16-2309 (3) or (4); and

(4) A complaint alleging neglect is filed with the Superior Court of the District of Columbia:

(A) At the end of 5 days if the parent or custodian fails to claim the child within that time; or

(B) Immediately upon the discovery of additional evidence of immediate danger to the child.

(c) When an investigation made pursuant to § 6-2102 or 6-2103 indicates that a child is an abused or a neglected child and when it has been determined that the child cannot be adequately protected by any of the services set forth in

subsection (a) or (b) of this section or by any other services, the Chief of the Division is authorized to:

(1) Remove the child with the consent of the parent, guardian, or other person acting in loco parentis;

(2) Request the Corporation Counsel of the District of Columbia to petition the Family Division of the Superior Court of the District of Columbia for a finding of neglect and, where appropriate, the removal of the child; and

(3) Request the police to remove the child when the consent of a parent, guardian or other custodian cannot be obtained and the need to protect the child does not allow sufficient time to obtain a court order.

TITLE 11

CHAPTER 1. GENERAL PROVISIONS.

D.C. Code § 11-101. Judicial power.

The judicial power in the District of Columbia is vested in the following courts:

(1) The following Federal Courts established pursuant to article III of the Constitution:

(A) The Supreme Court of the United States.

(B) The United States Court of Appeals for the District of Columbia Circuit.

(C) The United States District Court for the District of Columbia.

(2) The following District of Columbia courts established pursuant to article I of the Constitution:

(A) The District of Columbia Court of Appeals.

(B) The Superior Court of the District of Columbia.

D.C. Code § 11-102. Status of District of Columbia Court of Appeals.

The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code.

CHAPTER 11. FAMILY DIVISION OF THE SUPERIOR COURT.

D.C. Code § 11-1101. Exclusive jurisdiction.

The Family Division of the Superior Court shall be assigned, in accordance with chapter 9, exclusive jurisdiction of —

* * *

(9) proceedings in adoption; [and]

* * *

(13) proceedings in which a child, as defined in section 16-2301, is alleged to be delinquent, neglected, or in need of supervision. . . .

TITLE 16

CHAPTER 23. FAMILY DIVISION PROCEEDINGS.

Subchapter I. Proceedings Regarding Delinquency, Neglect, or Need of Supervision.

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Subchapter I. Proceedings Regarding Delinquency, Neglect, or Need of Supervision.

D.C. Code § 16-2301. Definitions.

As used in this subchapter —

(1) The term "Division" means the Family Division of the Superior Court of the District of Columbia.

(2) The term "judge" means a judge assigned to the Family Division of the Superior Court.

* * *

(9) The term "neglected child" means a child:

(A) who has been abandoned or abused by his or her parent, guardian, or other custodian; or

(B) who is without proper parental care or control, subsistence, education as required by law, or other care or control necessary for his or her physical, mental, or emotional health, and the deprivation is not due to the lack of financial means of his or her parent, guardian, or other custodian; or

(C) whose parent, guardian, or other custodian is unable to discharge his or her responsibilities to and for the child because of incarceration, hospitalization, or other physical or mental incapacity; or

(D) whose parent, guardian, or custodian refuses or is unable to assume the responsibility for the child's care, control or subsistence and the person or institution which is providing for the child states an intention to discontinue such care; or

(E) who is in imminent danger of being abused and whose sibling has been abused; or

(F) who has received negligent treatment or maltreatment from his or parent, guardian, or other custodian; or

(G) who has resided in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child is ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child.

* * *

(14) The term "shelter care" means the temporary care of a child in physically unrestricting facilities, designated by the Division, pending a final disposition of a petition.

* * *

(16) The term "factfinding hearing" means a hearing to determine whether the allegations of a petition are true.

(17) The term "dispositional hearing" means a hearing, after a finding of fact, to determine — . . .

(B) what order of disposition should be made in a neglect case.

* * *

(23) The term "abused", when used with reference to a child, means a child whose parent, guardian, or custodian inflicts or fails to make reasonable efforts to prevent the infliction of physical or mental injury upon the child, including excessive corporal punishment, an act of sexual abuse, molestation, or exploitation, or an injury that results from exposure to drug-related activity in the child's home environment.

D.C. Code § 16-2304. Right to counsel; party status.

* * *

(b) (1) When a child is alleged to be neglected or when the termination of the parent and child relationship is under consideration, the parent, guardian or custodian of the child named in the petition or in a motion to terminate is entitled to be represented by counsel at all critical stages of the proceedings, and, if financially unable to obtain adequate representation, to have counsel appointed in accordance with rules established by the Superior Court of the District of Columbia. . . .

D.C. Code § 16-2312. Detention or shelter care hearing; intermediate disposition.

(a) When a child is not released as provided in section 16-2311 —

(1) a detention or shelter care hearing shall be commenced not later than the next day (excluding Sundays) after the child has been taken into custody or transferred from another court as provided by section 16-2302; and

(2) a petition shall be filed at or prior to the detention or shelter care hearing.

* * *

(c) At the commencement of the hearing the judge shall advise the parties of the right to counsel, as provided in section 16-2304, and shall appoint counsel if required. He shall also inform them of the contents of the petition and shall afford the child, or in a neglect case, the parent, guardian, or custodian, an opportunity to admit or deny the allegations in the petition. He shall then hear from the Corporation Counsel to determine whether the child should be placed or continued in detention or shelter care under the criteria in section 16-2310. The child and his parent, guardian, or custodian shall have a right to be heard in their own behalf.

(d) (1) At the conclusion of the hearing, the judge shall —

(A) order detention or shelter care, setting forth in writing his reasons therefor, if he finds that the child's detention or shelter care is required under the critera in section 16-2310; or

(B) order the child released if he finds that the child's detention or shelter care is not required under such criteria.

(2) If a child is ordered released under paragraph (1) (B) of this subsection, the judge may impose one or more of the following conditions:

(A) Placement of the child in the custody of a parent, guardian, or custodian or under supervision of a person or organization agreeing to supervise him.

(B) Placement of restrictions on the child's travel, activities, or place of abode during the period of release.

(C) Any other condition reasonably necessary to assure the appearance of the child at a factfinding hearing or his protection from harm, including a requirement that the child return to the physical custody of the parent, guardian, or custodian after specified hours.

(e) When a judge finds that a child's detention or shelter care is required under the criteria of section 16-2310, he shall then hear evidence presented by the Corporation Counsel to

detemine whether there is probable cause to believe the allegations in the petition are true. The child, his parent, guardian or custodian may present evidence on the issues and be heard in their own behalf.

(f) When a judge finds there is probable cause to believe the allegations in the petition are true, he shall order the child to be placed or continued in detention or shelter care and set forth his reasons. When a judge finds that there is not probable cause to believe the allegations in the petition are true, he shall order the child to be released.

(g) The Division at a detention or shelter care hearing may not postpone the determination of whether detention or shelter care is required. For good cause shown, however, the Division may grant a continuance of any other part of the hearing (including the filing of a petition) for a period not to exceed five days.

(h) On motion by or on behalf of the child, a child in custody shall be released from custody if his detention or shelter care hearing is not commenced within the time set herein.

(i) If a child is not released after his detention or shelter care hearing and the parent, guardian or custodian did not receive notice thereof, the Division may, in the interest of justice, conduct a new hearing in accordance with rules prescribed by the Superior Court.

(j) Upon objection of the child or his parent, guardian or custodian, a judge who conducted a detention or shelter care hearing shall not conduct a factfinding hearing on the petition.

D.C. Code § 16-2313. Place of detention or shelter.

(a) A child who is alleged to be neglected and who is in custody may be placed at any time prior to disposition, only in —

(1) foster home;

(2) a group home, youth shelter, or other appropriate home for nondelinquent children; or

(3) another facility for shelter care designated by the Division, including an appropriate facility operated by the District of Columbia. . . .

D.C. Code § 16-2316. Conduct of hearings; evidence.

(a) The Division shall, without a jury, hear and adjudicate cases involving delinquency, need of supervision, or neglect. The Corporation Counsel shall present evidence in support of all petitions arising under this subchapter and otherwise represent the District of Columbia in all proceedings. . . .

D.C. Code § 16-2317. Hearings, findings; dismissal.

(a) Except as otherwise provided by statute or court rule, all motions shall be heard at the time of the factfinding hearing.

(b) After a factfinding hearing on the allegations in the petition, the Division shall make and file written findings in all cases as to the truth of the allegations, and in neglect cases, he shall also make and file written findings as to whether the child is neglected. If the Division finds that —

. . .

(2) in the case of a . . . neglect petition, that the allegations have not been established by the preponderance of the evidence, the Division shall dismiss the petition and order the child released from any detention or shelter care or other restriction previously ordered. If the proceedings are not terminated after the factfinding hearing, the Division shall review the need for detention or shelter care of the child.

(c) If the Division finds in a factfinding hearing that —

. . .

(2) the allegations in a . . . neglect petition have been established by the preponderance of the evidence,

the Division, after giving the notice required by subsection (e) of this section, shall proceed to hold a dispositional hearing. The Division may postpone a dispositional hearing to await the predisposition study and report of the Director of Social Services required by section 16-2319. . . .

(d) If the Division finds that the child is not in need of care or rehabilitation it shall terminate the proceedings and discharge the child from detention, shelter care, or other restriction previously ordered.

(e) The Division shall give prompt notice of any dispositional hearing as follows: . . .

(2) In neglect cases, to the child and to the parent, guardian, or custodian named in the petition if he can be found.

D.C. Code § 16-2319. Predisposition study and report.

(a) After a motion for transfer has been filed, or after the Division has made findings pursuant to subsection (c) of section 16-2317 sustaining the allegations of a petition and, in neglect cases, the conclusion that the child is neglected, the Division shall direct that a predisposition study and report to the Division be made by the Director of Social Services or a qualified agency designated by the Division concerning the child, his family, his environment, and other matters relevant to the need for treatment or disposition of the case. . . .

(c) (1) The report to the Division in neglect cases shall include, but not be limited to, the following information:

(A) the specific harms intervention is designed to alleviate;

(B) the plans for alleviating these harms including specific services, the proposed providers of the services recommended and the actions the parent, guardian, or custodian should take to alleviate these harms;

(C) the estimated time in which the goals of intervention may be achieved or in which it will be known that the goals may not be achieved; and

(D) the criteria to be used to determine that intervention is no longer necessary; and,

(2) If the removal of the child from his parent, guardian, or custodian is recommended, the report shall also include:

(A) the recommended type of placement;

(B) the reasons why the child cannot be protected in his or her home;

(C) the likely harm the child will suffer as a result of the separation from his or her parent, guardian, or custodian and recommended steps to be taken to minimize this harm; and

(D) the plans for maintaining contact between the parent and child through visitation rights in order to maximize the parent-child relationship consistent with the well-being of the child.

D.C. Code § 16-2320. Disposition of child who is neglected, delinquent, or in need of supervision.

(a) If a child is found to be neglected, the Division may order any of the following dispositions which will be in the best interest of the child:

(1) Permit the child to remain with his parent, guardian, or other custodian, subject to such conditions and limitations as the Division may prescribe, including but not limited to medical, psychiatric, or other treatment at an appropriate facility on an out-patient basis.

(2) Place the child under protective supervision.

(3) Transfer legal custody to any of the following —

(A) a public agency responsible for the care of neglected children;

(B) a child placing agency or other private organization or facility which is licensed or otherwise authorized by law and is designated by the Mayor of the District of Columbia to receive and provide care for the child; or

(C) a relative or other individual who is found by the Division to be qualified to receive and care for the child except that no child shall be ordered placed outside his or her home unless the Division finds the child cannot be protected in the home and there is an available placement likely to be less damaging to the child than the child's own home. It shall be presumed that it is generally preferable to leave a child in his or her own home.

(4) Commitment of the child for medical, psychiatric, or other treatment at an appropriate facility on an in-patient

basis if, at the dispositional hearing provided for in section 16-2317, the Division finds that confinement is necessary to the treatment of the child. A child for whom medical, psychiatric, or other treatment is ordered may petition the Division for review of the order thirty days after treatment under the order has commenced, and, if, after a hearing for the purpose of such review, the original order is affirmed, the child may petition for review thereafter every six months.

(5)The Division may make such other disposition as is not prohibited by law and as the Division deems to be in the best interests of the child. The Division shall have the authority to (i) order any public agency of the District of Columbia to provide any service the Division determines is needed and which is within such agency's legal authority and (ii) order any private agency receiving public funds for services to families or children to provide any such services when the Division deems it is in the best interests of the child and within the scope of the legal obligations of the agency.

(6) Terminate the parent and child relationship for the purpose of seeking an adoptive placement for the child pursuant to subchapter III of this chapter. . . .

D.C. Code § 16-2322. Limitation of time on dispositional orders.

(a) (1) A dispositional order vesting legal custody of a child in a department, agency, or institution shall remain in force for an indeterminate period not exceeding two years. Unless the order specifies that release is permitted only by order of the Division, the department, agency, or institution may release the child at any time that it appears the purpose of the disposition order has been achieved.

(2) An order vesting legal custody of a child in an individual other than his parent shall remain in force for two years unless sooner terminated by order of the Division.

* * *

(b) A dispositional order vesting legal custody of a child in an agency or institution may be extended for additional periods of one year, upon motion of the department, agency, or institution to which the child was committed, if, after notice and hearing, the Division finds that —

(1) in the case of a neglected child, the extension is necessary to safeguard his welfare. . . .

D.C. Code § 16-2323. Review of dispositional orders.

(a) When a child has been adjudicated neglected and a dispositional order has been entered by the Division, the Division shall hold a review hearing.

(1) at least every six (6) months for a child under the age of six (6) years who is committed to the custody of an agency, department, or institution;

(2) at least every six (6) months for a child of any age who is committed to the custody of an agency, department, or institution but has not been committed for longer than two (2) years;

(3) at least every year for all other children.

(b) At least ten (10) days prior to each review hearing the Division or the department, agency, or institution responsible for the supervision of the services to the child and his parent, guardian, or custodian shall submit a report to the Division which shall include, but not be limited to, the following information:

(1) the services provided or offered to the child and his parent, guardian or other custodian;

(2) any evidence of the amelioration of the condition which resulted in the finding of neglect and any evidence of new problems which would adversely affect the child;

(3) an evaluation of the cooperation of the parent, guardian or custodian with the Division or the applicable department, agency, or institution;

(4) in those cases in which the custody of the child has been vested in a department, agency, institution or person other than the parent —

(A) the extent to which visitation has occurred and any reasons why visitation has not occurred or has been infrequent,

(B) the estimated time in which the child can be returned to the home, and

(C) whether the agency has initiated or intends to initiate the filing by the Corporation Counsel of a motion requesting the termination of the parent and child relationship and any reasons why it does not intend to initiate the filing of such a motion; and

(5) such other information as may be required by rules of the Superior Court of the District of Columbia.

(c) A notice of a review hearing under this section shall be given to all parties and their attorneys of record as prescribed by rules of the Superior Court of the District of Columbia.

(d) If the Division finds that the commitment of the child to a department, agency, institution or person other than the parent is no longer necessary to safeguard the welfare of the child, the Division may order:

(1) the child returned to the home and the provision of supervision or other services; or

(2) any other disposition authorized by section 16-2320 (a).

Subchapter III. Proceedings Regarding the Termination of Parental Rights of Certain Neglected Children.

D.C. Code § 16-2351. Purpose of the subchapter; construction of provisions.

(a) The general purposes of this subchapter are to:

(1) encourage stability in the lives of certain children who have been adjudicated neglected and have been removed from the custody of their parent by providing judicial procedures for the permanent termination of the parent and child relationship in the circumstances set forth in this subchapter;

(2) ensure that the constitutional rights of all parties are recognized and enforced in all proceedings conducted pur-

suant to this subchapter while ensuring that the fundamental needs of children are not subjugated to the interests of others; and

(3) increase the opportunities for the prompt adoptive placement of children for whom parental rights have been terminated.

(b) This subchapter shall be liberally construed to promote the general purposes stated in this section.

D.C. Code § 16-2352. Definitions

(a) As used in this subchapter, unless the context otherwise requires:

(1) "Parent and child relationship" includes all rights, powers, privileges, immunities, duties and obligations existing under law between a parent and child, including rights of inheritance. The words apply equally to every child and every parent regardless of the martial status of the parents of the child.

(2) "termination of the parent and child relationship" means the adjudication that a child is free from the custody and control of either or both of his or her living parents by means of a court order that completely severs and extinguishes the parent and child relationship.

(b) The terms found in this subchapter which are defined in section 16-2301 of this chapter shall be given the same definition herein.

D.C. Code § 16-2353. Grounds for termination of parent and child relationship.

(a) A judge may enter an order for the termination of the parent and child relationship when the judge finds from the evidence presented, after giving due consideration to the interests of all parties, that the termination is in the best interests of the child.

(b) In determining whether it is in the child's best interests that the parent and child relationship be terminated, a judge shall consider each of the following factors:

(1) the child's need for continuity of care and caretakers and for timely integration into a stable and permanent home, taking into account the differences in the development and the concept of time of children of different ages;

(2) the physical, mental and emotional health of all individuals involved to the degree that such affects the welfare of the child, the decisive consideration being the physical, mental and emotional needs of the child;

(3) the quality of the interaction and interrelationship of the child with his or her parent, siblings, relative and/or caretakers, including the foster parent;

(3A) the child was left by his or her parent, guardian, or custodian in a hospital located in the District of Columbia for at least 10 calendar days following the birth of the child, despite a medical determination that the child was ready for discharge from the hospital, and the parent, guardian, or custodian of the child has not taken any action or made any effort to maintain a parental, guardianship, or custodial relationship or contact with the child; and

(4) to the extent feasible, the child's opinion of his or her own best interests in the matter; and

(5) evidence that drug-related activity continues to exist in a child's home environment after intervention and services have been provided pursuant to section 106 (a) of the Prevention of Child Abuse and Neglect Act of 1977. . . .

D.C. Code § 16-2355. Consideration of termination of the parent and child relationship at review hearings.

(a) After a child adjudicated neglected by the Division pursuant to this chapter has been committed by the Division to the custody of a department, agency or institution for more than eighteen (18) months and no hearing on a motion for the termination of the parent and child relationship has been held within the preceding twelve (12) months, the Division shall, at a review hearing, determine why a motion to terminate the parent and child relationship has not been filed.

(b) For each child who remains in custody for three (3) years or more, the Division shall, at each annual review hearing, detemine why a motion to terminate the parent and child relationships has not been filed.

D.C. Code § 16-2356. Parties.

Parties to a proceeding for the termination of the parent and child relationship shall be the child, the parent of the named child, and the agency having the legal custody of the child. The judge may at his or her discretion, name on his or her own motion or in response to a motion for joinder or intervention, join additional parties to a proceeding to terminate the parent and child relationship.

D.C. Code § 16-2360. Disposition after termination.

(a) If a judge finds that sufficient grounds exist for the termination of the parent and child relationship, the judge shall so order and decree and shall vest the legal custody of the child in a department, agency or institution.

(b) The department, agency or institution to which a child is committed after the termination of the parent and child relationship pursuant to this subchapter shall be responsible for seeking the prompt adoptive placement of the child and, if an adoptive placement has not been made within three (3) months, the department, agency, or institution shall list the child on all appropriate local, regional and national adoption exchanges. If an adoptive placement has not been made within six (6) months of the termination, a hearing shall be held and within every six (6) months thereafter the department, agency or institution shall report to the Division on its efforts to secure an adoptive placement, including but not limited to the following information:

(1) the extent to which an adoption has been explored with the child's foster parent and any reasons why an adoption by the foster parent is not appropriate;

(2) all adoption exchanges with which the child has been listed and the date of each listing; and

(3) the limitations placed on the families to be considered for the adoption of the child.

(c) The information provided pursuant to subsection (b) shall be provided to the guardian ad litem at least ten (10) days prior to a review hearing.

(d) A notice of a review hearing shall be given as prescribed by rules of the Superior Court of the District of Columbia to the child's guardian ad litem. Any person with whom the child has been living for six (6) months or more shall be given notice of hearings and shall upon his or her request be joined as a party to a review hearing.

(e) If the Division finds that the department, agency or institution vested with the custody of the child is not making sufficient efforts to secure an adoptive placement for the child or that inappropriate limitations have been placed on potential adoptive families, the Division may order such additional efforts as it deems appropriate or may order that the imposition of inappropriate limitations be eliminated or may transfer the power to consent to an adoption together with the vestment of legal custody to any other licensed child placement agency.

No. 93-724

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

SHARON FRATT KELLY, *et al.*,

Petitioners,

—v.—

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly concluded, in a class action alleging that executive-branch officials of the District of Columbia engaged in a pattern and practice of violations of federal and District of Columbia law in the operation of the District's foster-care system, that a district court need not abstain from adjudicating federal claims that there was no opportunity to litigate in District of Columbia proceedings in which only some of petitioners were involved.

2. Whether the court of appeals correctly relied on local law in affirming a district court's judgment that was based on local and federal law.

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STATUTORY PROVISIONS INVOLVED

In addition to the District of Columbia statutes cited by petitioners, this case involves the federal Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974), as amended by Pub. L. No. 100-294, 102 Stat. 102 (1988)(codified as amended in relevant part at 42 U.S.C. §5106a); and the federal Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. §§620-628, 670-679a).[1] This case also involves the Due Process Clause of the Fifth Amendment to the United States Constitution, which provides in relevant part, "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

COUNTERSTATEMENT OF THE CASE

Contrary to petitioners' repeated assertions, this is not a child-custody case, nor does it involve any questions concerning adjudications whether a child should be removed from the custody of his or her parents or whether parental rights should be terminated so that a child may be adopted. Nor is this a case in which a federal court has been asked to second-guess discretionary decisionmaking in individual cases.

Rather, this is a case in which a class of several thousand children alleged -- and a district court found after a full trial on the merits -- that executive-branch officials of the District of Columbia operate a child-welfare system that systematically deprives respondent children of their rights under federal statutory law, the United States Constitution, and statutory law of the Dis-

[1] Respondents have set out the relevant text of these statutes in their appendix.

trict of Columbia.[2] This is no more a child-custody case than a case challenging the conditions of confinement of the mentally incompetent is a challenge to an individual competency proceeding or than a case challenging the conditions of a prison facility is a challenge to an individual finding of guilt.

In this case the district court, relying on more than one thousand admissions by petitioners -- various executive-branch officials of the District of Columbia -- and two weeks of uncontroverted expert testimony adduced by respondents, concluded that petitioners had engaged in a persistent and pervasive course of unlawful conduct that irreparably harmed respondent children. In a comprehensive and detailed opinion, the district court held that petitioners had violated respondents' rights under federal and local law and entered judgment against petitioners. *See LaShawn A. ex rel. Moore v. Kelly*, 762 F.Supp. 959 (D.D.C. 1991).

Petitioners appealed the district court's liability judgment[3] to the United States Court of Appeals for the District of Columbia Circuit, arguing that the district court should have abstained from adjudicating the federal claims and that the district court erred in construing

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[2] As the court of appeals explained, "[T]he district court found that the District of Columbia Department of Human Services ("DHS"), the agency entrusted with the care of foster children and abused and neglected children, has consistently evaded numerous responsibilities placed on it by local and federal statutes . . . [and] as to the children already enmeshed in the foster-care system, that the practices of DHS deprived them of their due process rights under the Fifth Amendment to the United States Constitution." *LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319, 1321 (D.C.Cir. 1993).

[3] The parties separately negotiated a remedial order obligating petitioners to reform the District's foster-care system. That remedial order, which the District is now implementing, is not at issue in this appeal, but it contains a provision under which petitioners reserved their right to appeal the liability judgment only.

respondents' federal rights. A unanimous panel of the court of appeals rejected petitioners' abstention argument and affirmed the district court's liability order by relying on petitioners' violations of District of Columbia law. *See LaShawn A. ex rel. Moore v. Kelly*, 990 F.2d 1319 (D.C.Cir. 1993).

Petitioners next moved for a rehearing by the panel or for a rehearing *en banc* by the court of appeals. The court denied these motions, *see* Pet.App. at 95-97, and petitioners filed this petition for a writ of *certiorari* with this Court.

SUMMARY OF ARGUMENT

Petitioners assert that the court of appeals erroneously concluded that the district court appropriately adjudicated respondents' constitutional claims;[4] according to petitioners, the district court should have abstained pursuant to *Younger v. Harris*, 401 U.S. 37 (1971). Alternatively, petitioners contend that the court of appeals erred in relying solely on petitioners' violations of local law in affirming the district court's liability judgment. Both of these contentions are meritless, and neither presents an issue that justifies the granting of a writ of *certiorari*.

Petitioners' abstention argument is predicated upon their characterization of this case as a challenge to child-custody decisions that are the subject of ongoing District of Columbia proceedings. As noted above, however, this case does not involve any such challenge; instead, it seeks to remedy a pattern and practice of executive-branch violations of federal and District of Columbia law, and this Court has never suggested that a district

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[4] Petitioners apparently do not argue to this Court that the district court should have abstained from adjudicating respondents' federal statutory claims. *See infra* note 11.

court should consider abstaining from adjudicating this type of suit. Moreover, the court of appeals expressly determined that there were no ongoing judicial proceedings in the District of Columbia in which respondents could have litigated their federal claims. This precludes abstention, even if this were the type of case in which abstention might be considered.

Petitioners' attack on the court of appeals' reliance on local law to affirm the district court's liability judgment is equally baseless. In relying solely on local law -- and thus avoiding unnecessary rulings on federal law -- the court of appeals was simply complying with rulings of this Court. As for petitioners' argument that the District of Columbia law upon which the court of appeals relied does not afford respondents a private cause of action, petitioners have waived this defense and are precluded from raising it now because they failed to present it either to the district court or to the court of appeals, having raised it for the first time in their motion to the court of appeals for a rehearing *en banc*. And, even if they had not waived the defense, petitioners' argument is groundless, as the court of appeals correctly relied upon a decision from the highest court of the District of Columbia that expressly held that children have a private cause of action under the District of Columbia statute at issue in this case.

Finally, beyond the meritlessness of petitioners' arguments, neither of their objections justify the granting of a writ of *certiorari*. The lower courts uniformly have rejected the abstention argument urged by petitioners, and the court of appeals' rulings are completely consistent with the decisions of this Court.

INTRODUCTION

Foster care is a government system -- funded by local and federal funds -- established to care for children who cannot be cared for by their own parents. Given

the governmental role in foster care, respondent children -- who comprise a class of all children in the foster-care custody of the District of Columbia and all children known to the District as the result of a report of suspected abuse or neglect[5] -- have a panoply of legal rights under the laws of the United States and of the District of Columbia and under the United States Constitution.

Rather than challenge child-custody determinations or other related decisions committed to the discretion of the District of Columbia and its courts, it was these statutory and constitutional rights that respondents alleged petitioners had violated. Specifically, respondent children alleged petitioners operated a foster-care system that violated the Due Process Clause of the Fifth Amendment to the United States Constitution, the federal Child Abuse Prevention and Treatment Act,[6] the District of Columbia Prevention of Child Abuse and Neglect Act of 1977,[7] the District of Columbia Youth Residential Facilities Licensure Act,[8] and the federal Adoption Assistance and Child Welfare Act of 1980.[9]

Under these mandates, the District of Columbia is required, for instance, to

> -- initiate investigations into reports of suspected abuse and neglect promptly and to take appropriate steps to protect children who are the subject of such reports, 42 U.S.C. §5106a(b)(2); D.C. Code Ann. §6-

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[5] *See* 762 F.Supp. at 994 n.28 (class definition).

[6] Codified as amended at 42 U.S.C. §§5101-5106a, 5116.

[7] Codified as amended at D.C. Code Ann. §§2-1351 to 2-1357; 6-2101 to 6-2107; 6-2111 to 6-2119; 6-2121 to 6-2127; and 16-2301 to 16-2338, 16-2351 to 16-2365.

[8] Codified as amended at D.C. Code Ann. §§3-801 to 3-808.

[9] Codified as amended at 42 U.S.C. §§620-628, 670-679a.

2102(b);

-- assure that all children who enter foster care receive written case plans and periodic reviews of their cases, 42 U.S.C. §§627(a)(2)(B), 671(a)(16), 675(5); D.C. Code Ann. §§6-2107(b), 16-2323(a);

-- provide children with safe placements in which they will not be harmed and provide whatever services are necessary to assure that children in foster care are not harmed, U.S. Const., amend. V; D.C. Code Ann. §§3-802, 3-803, 3-805; 42 U.S.C. §671(a)(10);

-- provide services to families in an effort to return children home, when appropriate, 42 U.S.C. §627(a)(2)(C); D.C. Code Ann. §§6-2123(b)(1, 3), 6-2107(b);

-- provide services to those children who cannot return home so that they will be able to be adopted or placed in alternative permanent placements outside of government custody; 42 U.S.C. §§627(a)(2)(C), 675(1); D.C. Code Ann. §§6-2123(b)(1-2), 6-2107(b); and

-- have sufficient staff, supervisory personnel, and resources to comply with the mandates of District of Columbia law, D.C. Code Ann. §6-2122(c); and maintain staff qualifications, worker caseloads, and supervision requirements consistent with reasonable professional standards, *id.* §6-2122(d).

It is difficult to imagine a child-welfare system that is further from complying with these legal mandates than the District of Columbia's. On the basis of over one thousand formal admissions by petitioners, *see* 762 F.

Supp. at 964, and after a two-week trial at which respondents adduced uncontroverted statistical evidence and expert testimony about class-wide violations of respondents' rights and about the devastating consequences of those violations for these helpless children, district court judge Thomas F. Hogan held that petitioners' violations amounted to a "persistent, pervasive practice, attributable to a course deliberately pursued by official policymakers," *id.* at 990 (quotations and citation omitted), and concluded that "the children in the District's foster care have been and continue to be irreparably harmed -- psychologically, emotionally, and sometimes physically -- by the inappropriate treatment they have received while in that care," *id.* at 986.

These findings were inevitable, given the evidence adduced at trial. For instance, named plaintiff LaShawn A. entered foster care when she was thirty months old after her mother placed her in District "emergency care." Though District law directs that emergency care is to last no longer than ninety days, LaShawn languished there for two and one-half years, during which time the District never developed any case plans for her and her case was never reviewed, in violation of federal and District of Columbia law. She was placed in a foster home in which she may have been sexually and physically abused, and she began to develop psychiatric problems. At trial, a psychiatric expert reported that, when he asked six-year-old LaShawn who hated her, she identified her foster mother and indicated that the woman beat her. When the doctor asked her who loved her, LaShawn replied, "no one." *Id.* at 983.

Named plaintiff Kevin E. experienced a similarly disturbing odyssey through the District's foster-care system. Kevin entered foster care as an infant and was still in government custody at the time of trial -- eleven years later. At the age of four, the District returned him to his mother, who had previously abused him, not in an ef-

fort to reunite them but simply because the District mistakenly had allowed its legal custody of Kevin to lapse. The District then failed to supervise the placement, and Kevin was abused by his mother again; he thus reentered foster care. Though the District had concluded soon after he had entered foster care as a baby that Kevin should be adopted, District officials never followed mandated procedures to make Kevin available for adoption, thus relegating him to long-term government custody. At the age of eight, after one failed suicide attempt, Kevin placed himself in a trash can and asked to be thrown away. *See id.* at 985.

Tragically, these stories are typical of what is happening to thousands of children in the District's foster-care program. For instance,

> -- For years, the Department failed to initiate and complete investigations in a timely manner, piling up backlogs of thousands of children known to be in potentially dangerous situations. 762 F.Supp. at 968-70;
>
> -- Nearly 75% of children in the District's emergency-care custody had been there more than 90 days -- the limit imposed by District law -- and members of the respondent class had languished there for as long as two years, with the result being "a state of limbo for these children who . . . do not have any case plans prepared on their behalf." *Id.* at 971;
>
> -- Of the children who were to be returned home -- the most common planning category -- 62% did not have and never had had a written case plan. *See id.* at 973. Of the children whom petitioners had consigned to permanent foster care -- a planning goal that District policy directs not be assigned to any

child younger than 12 -- 29% had been assigned that goal before they were one year old, and 48% had been assigned it before they were four. *Id.*;

-- Of the children in foster care, 42% had never had a medical examination since having entered the District's custody, and 79% had not had a dental examination. *Id.* at 974;

-- The Department routinely placed children in overcrowded foster homes, with approximately 40% of the District's foster homes having more children in them than their licenses permitted. Stipulated Findings of Fact 722-25, J.A. at 355.[10]

-- Although the shortage of adoptive and foster homes was widely recognized, the Department had assigned only one and a one-half workers to do all foster and adoptive home recruitment. 762 F.Supp. at 975-76. Not surprisingly, the district court found that petitioners "consistently failed to expedite the progression of children in its custody toward permanent placement through adoption." *Id.* at 975;

-- In the cases of more than one-half of the children in the District's foster-care custody, there was no evidence that they had ever been visited by their social worker. *Id.* at 974. In a related vein, 149 class members in the District's custody had no social worker at all. *Id.*;

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[10] This citation is to the joint appendix submitted by the parties to the court of appeals.

-- Of the children for whom the District had determined that adoption was appropriate, only 29% had been referred to the adoption unit in a timely manner, and for 14% of the children it had taken over one year to complete this simple but necessary administrative step. Of the children who were legally freed for adoption but not placed in an adoptive home, only 24% had ever been referred for placement. *Id.* at 975. And the district court noted that "[t]he defendants have admitted that the[y] often fail[] to refer children for adoption even when all hope for family reunification is gone." *Id.* at 996;

-- While the national average stay in foster care is just over two years, children in the District's foster-care system remain there for an average of nearly five years. *Id.* at 968; and

-- At the time of trial, 107 of 239 authorized social worker positions within the District's child-welfare agency were vacant. This resulted in those workers on the job having to carry dangerously high caseloads, with one worker testifying that her caseload had *declined* to 69 families and 251 children. The court found that the agency "is unable to carry out its responsibilities under federal and District law while its social workers are operating at existing caseloads." *Id.* at 978.

In an attempt to deflect attention from these findings, petitioners repeat the same misleading assertion that they unsuccessfully proffered to the court of appeals and to the district court: that this case concerns issues of child custody, of whether children should be left at home or removed from their parents, and of whether parental rights should be terminated in individual cases so

that children can be legally freed for adoption. Respondents recognize that these are difficult, subjective decisions that should be left to the discretion of individual caseworkers in the District of Columbia and to its courts. In this case, however, respondents did not challenge the exercise of that discretion, and this appeal raises no questions concerning those issues.

Rather, this case is about the knowing and deliberate failure of high-level executive-branch officials to comply with clear legal mandates intended to protect the innocent victims of child abuse and neglect. Or, in the words of Judge Hogan, it is about

> the failures of an ineptly managed child welfare system, the indifference of the administration of the former mayor of the District of Columbia, Marion Barry, and the resultant tragedies for District children relegated to entire childhoods spent in foster care drift. Unfortunately, it is about a lost generation of children whose tragic plight is being repeated every day.

762 F.Supp. at 960.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT THE DISTRICT COURT SHOULD NOT HAVE ABSTAINED FROM ADJUDICATING RESPONDENTS' FEDERAL CLAIMS

Petitioners assert that the rule first articulated in *Younger v. Harris* required the district court to abstain from adjudicating respondents' federal constitutional

claims. *See* Petition at 15-24.[11] This assertion evinces a fundamental misunderstanding of the *Younger* principle. Moreover, it cannot withstand the court of appeals' determination that there were no ongoing state judicial proceedings in which respondents could have litigated their federal claims.

As an initial matter, *Younger* abstention should not even be considered here because this case falls outside the substantive scope of the *Younger* doctrine. As this Court has explained, "The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction, is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy properly before it." *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976)(internal quotations omitted). "Abstention rarely should be invoked, because the federal courts have a virtually unflagging obligation . . . to exercise the jurisdiction given them." *Ankenbrandt v. Richards*, 504 U.S. ___, ___, 112 S.Ct. 2206, 2215 (1992) (quotations and citation omitted).

Consistent with this admonition, every case in which this Court has found *Younger* abstention to be appropriate has been limited to a situation in which the federal plaintiff was the subject of an ongoing or imminent state proceeding that the plaintiff sought to enjoin or preempt through a challenge in federal court to the constitutionality of some aspect of the state proceeding or state law. *See, e.g., Moore v. Sims*, 442 U.S. 415 (1979)(approving

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[11] Petitioners limit their abstention argument to respondents' constitutional claims. To the extent this is a concession that no basis exists for the district court to have abstained from adjudicating respondents' federal statutory claims, this further undermines petitioners' abstention argument, for it would be wholly contrary to the purposes of abstention to have a federal district court split plaintiffs' federal claims into two cases by abstaining from adjudicating some federal claims while proceeding to address others.

abstention in case in which federal plaintiff sought to enjoin enforcement of Title 2 of the Texas Family Code through constitutional challenge to statute in federal court).[12] This limitation logically follows from the federalism policy consideration justifying *Younger* abstention: the importance of allowing state courts to move forward with their own proceedings and of respecting the role of state courts in construing state statutes that are the basis of ongoing or imminent judicial proceedings in which the constitutionality of the statutes could be challenged. *See id.* at 429.[13]

In this case, however, respondents did not seek to

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[12] *Accord Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987)(approving abstention in case in which federal plaintiff sought to enjoin state enforcement of Texas law concerning supersedeas bonds through constitutional challenge to statute in federal court); *Ohio Civil Rights Commission v. Dayton Christian Schools, Inc.*, 477 U.S. 619 (1986)(approving abstention in case in which federal plaintiff sought to enjoin pending state proceedings through constitutional challenge to proceedings in federal court); *Middlesex Ethic Committee v. Garden State Bar Association*, 457 U.S. 423 (1982)(approving abstention in case in which federal plaintiff sought to enjoin state enforcement of New Jersey disciplinary rules through constitutional challenge to rules in federal court); *Trainor v. Hernandez*, 431 U.S. 434 (1977)(approving abstention in case in which federal plaintiff sought to enjoin enforcement of Illinois law governing attachment through constitutional challenge to statute in federal court); *Juidice v. Vail*, 430 U.S. 327 (1977)(approving abstention in case in which federal plaintiff sought to enjoin state enforcement of New York statutory contempt procedures through constitutional challenge to statute in federal court); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1974)(approving abstention in case in which federal plaintiff sought to enjoin enforcement of Ohio anti-nuisance statute through constitutional challenge to statute in federal court); *Younger v. Harris*, 402 U.S. 37 (approving abstention in case in which federal plaintiff sought to enjoin state enforcement of California criminal syndicalism statute through constitutional challenge to statute in federal court).

[13] The *Younger* doctrine may not even apply to the District of Columbia, as it is unclear whether the District of Columbia is a state for these purposes. *See, e.g.*, 990 F.2d at 1322.

enjoin or to interfere with any District of Columbia judicial proceeding, nor did they challenge the constitutionality of any District of Columbia statute. Rather, they sought injunctive relief against executive-branch officials to assure executive-branch compliance with statutory and constitutional obligations imposed upon these officials. To accept petitioners' suggestion that the *Younger* doctrine is even relevant in a case such as this would transform that narrow doctrine from one intended to protect the integrity of state judicial proceedings into a broad exhaustion requirement that would deprive plaintiffs of a federal forum to vindicate federal rights and that would immunize state executive-branch officials from scrutiny by the federal courts.

Even if this were the type of case in which abstention theoretically might be considered, it would be inappropriate in this case because there were no ongoing state proceedings in which respondents could have litigated their federal claims. Petitioners contend that respondents should have been required to bring this suit alleging systemic violations of federal and District of Columbia law and seeking injunctive relief against executive-branch officials of the District of Columbia as part of individual abuse and neglect proceedings in the Family Division of the Superior Court of the District of Columbia. *See* Petition at 25.

The court of appeals, however, closely examined this contention and found that a substantial portion of the class is not involved in any District of Columbia proceedings, that the Family Division proceedings in which some of the plaintiff class members are involved are extremely limited in scope and deal with issues wholly unrelated to the claims the children brought in federal court, and that the rules governing Family Division proceedings preclude class actions. *See* 990 F.2d at 1323. Most importantly, perhaps, the court of appeals pointed to two decisions in which District of Columbia courts

held that children in abuse-and-neglect proceedings could not litigate in those proceedings the types of claims at issue here. *See id.* Given this, the court of appeals concluded that "there was no pending judicial proceeding in the District of Columbia" in which respondents could have litigated their federal claims. *See id.* at 1323.

Petitioners do not even suggest that this conclusion -- or the court of appeals' description of Family Division proceedings -- is erroneous.[14] Because respondents had no opportunity to litigate their federal claims in the courts of the District of Columbia, no basis existed for the district court to have abstained from adjudicating those federal claims. *See Moore*, 442 U.S. at 425 ("The pertinent issue is whether appellees' constitutional claims could have been raised in the pending state proceedings").

Finally, petitioners' abstention argument raises no question worthy of a writ of *certiorari*. The lower courts uniformly have ruled that children like respondents here may litigate in federal court the federal claims at issue in this case. *See Joseph A. ex rel. Wolfe v. New Mexico Department of Human Services*, 575 F.Supp. 346, 350 (D.N.M. 1983); *Wilder v. Bernstein*, 645 F.Supp. 1292, 1339 n.37 (S.D.N.Y. 1986), *aff'd on other grounds*, 848 F.2d 1338 (2d Cir. 1988); *see also Winston v. Children and Youth Services*, 948 F.2d 1380, 1385-86 (3d Cir. 1991)(rejecting abstention argument in individual case), *cert. denied*, ___ U.S. ___, 112 S.Ct. 2303 (1992); *Timmy S. v. Stumbo*, 537 F.Supp. 39, 46 (E.D.Ky. 1981)(same).[15]

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[14] Petitioners assert only that "the claims of the children who are parties to Family Division proceedings, even if constitutionally based, relate to core Family Division issues." Petition at 20.

[15] Petitioners' effort to demonstrate a conflict among the circuits, *see* Petition at 18-20, again relies upon the erroneous characterization of (continued...)

And nothing in *Moore v. Sims* suggests that the court of appeals "has decided a federal question in a way that conflicts with applicable decisions of this Court." Sup.Ct. R. 10.1(c). In *Moore* -- as in every other *Younger* case decided by this Court -- federal plaintiffs sought to attack through a federal case state judicial proceedings in which they were involved and in which they could have litigated their federal claims. More specifically, in *Moore* the federal plaintiffs were parents who, in an effort to regain custody of their three children who were involved in Texas abuse-and-neglect proceedings, had filed a federal suit seeking to enjoin those proceedings through a constitutional challenge to the Texas statutes that authorized the proceedings. *See* 442 U.S. at 418-22. Finding that the parents could have litigated their constitutional claims through the ongoing state proceedings, this Court held that the district court should have abstained. *See id.* at 423-35.

Moore is clearly distinguishable from this case. Here, respondents do not challenge the constitutionality of any state statute nor do they seek to enjoin or to interfere with any ongoing or imminent state judicial proceeding. Moreover, the court of appeals expressly found that respondents had no opportunity to litigate their federal claims in the courts of the District of Columbia.[16]

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[15] (...continued)
this case as one involving individual child-custody issues, which it is not.

[16] Similarly, the Court's decision in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983), has no bearing on this case. In relevant part, the Court noted in *Feldman* that a district court did not have the authority to review a judicial decision of the highest court of the District of Columbia, that authority having been vested exclusively in this Court. *See id.* at 476. In this case, respondents did not challenge in federal district court any ruling of the District of Columbia Court of Appeals nor of any other court of the District of Columbia.

(continued...)

II. THE COURT OF APPEALS CORRECTLY RELIED ON PETITIONERS' VIOLATIONS OF LOCAL LAW

Petitioners next contend that the court of appeals erroneously relied on petitioners' violations[17] of District of Columbia law as a basis for affirming the district court's liability judgment. *See* Petition at 25-29.[18] According to petitioners, the court of appeals' reliance on local law "is a novel and startling principle of judicial decision-making." *Id.* at 26 n.15.

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[16] (...continued)

In a related vein, petitioners' contention that the section of the remedial order that discusses "dispositional hearings" improperly provides for federal court supervision of District of Columbia courts, *see* Petition at 21, is groundless. The remedial order was negotiated by the parties and agreed to by petitioners; it is not at issue in this appeal. Moreover, the provision cited by petitioners imposes no obligation on the local courts and does not provide for district court oversight of those courts; its obligations run solely to petitioners.

[17] Petitioners' characterization of their violations of local law as "alleged," *see* Petition at 26, ignores the district court's numerous findings, which petitioners do not challenge, that petitioners in fact violated District of Columbia law. *See* 762 F.Supp. 959, 968-70 (protective services; citing D.C. Code Ann. §6-2102(b)); *id.* at 970-71 (preventive services; citing D.C. Code Ann. §§6-2105, 6-2124); *id.* at 971-72 (placements; citing D.C. Code Ann. §6-2123(a)); *id.* at 972-74 (case planning; citing D.C. Code Ann. §2107(b)); *id.* at 963, 974 (in-custody services; citing D.C. Code Ann. §§6-2107(b), 6-2123(a)(3), 6-2124); *id.* at 974 (periodic reviews; citing D.C. Code Ann. §16-2323(a)); *id.* at 974-75 (adoption services, citing D.C. Code Ann. §6-2123); *id.* at 964, 976 (information system; citing D.C. Code Ann. §6-2111); *id.* at 964, 977-79 (caseloads, staffing, supervision and training; citing D.C. Code Ann. §6-2122); *id.* at 979 (monitoring of placements; citing D.C. Code Ann. §§3-802, 3-805).

[18] To the extent petitioners intend to suggest that no basis exists for pendent jurisdiction, that suggestion is baseless. *See United Mine Workers of America v. Gibbs*, 383 U.S. 715, 721-29 (1986). Moreover, petitioners never challenged the district court's authority to adjudicate the local claims and thus waived this defense.

Petitioners correctly note that the court of appeals, after having concluded that "[e]very claim supported by federal law is also supported by District law," 990 F.2d at 1324, affirmed the district court's liability order by relying solely on petitioners' violations of local law, *see id.* at 1324-26. Petitioners' suggestion, however, that the court of appeals erred in this approach is contrary to an express direction of this Court:

> This Court long has held generally that when a federal court obtains jurisdiction over a federal claim, it may adjudicate other related claims over which the court otherwise would not have jurisdiction. *The Court also has held that a federal court may resolve a case solely on the basis of a pendent state-law claim and that in fact the court usually should do so in order to avoid federal constitutional questions.*

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 117 (1984)(citing *Ashwander v. TVA*, 297 U.S. 288 (1936)(Brandeis, J., concurring); other citations omitted; emphasis added); *see also United Mine Workers of America v. Gibbs*, 383 U.S. 715, 722 (1966)(stating that "where the federal question averred is not plainly lacking in substance, even though the federal ground be not established, [a federal court] may nevertheless retain and dispose of the case upon the non-federal ground"). The court of appeals did not err in relying on petitioners' violations of District of Columbia law to affirm the district court's liability judgment.[19]

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[19] Petitioners' reliance on *Ankenbrandt v. Richards*, 112 S.Ct. 2206 (1992), is misplaced. In relevant part, the Court held in *Ankenbrandt* that federal diversity jurisdiction contains a "domestic relations exception" that encompasses "only cases involving the issuance of a divorce, alimony, or child-custody decree." *Id.* at 2215. This case involves none of these issues.

As for petitioners' contention that respondents have no cause of action under the relevant District of Columbia law, it is untimely and wrong. It was not until they filed a motion for rehearing *en banc* with the court of appeals that petitioners raised for the first time any question about respondents' local-law claims.[20] Petitioners' failure to present this issue to the district court or the court of appeals precludes petitioners from raising it at this stage of the proceedings. *See, e.g., Brown v. Trustees of Boston University*, 891 F.2d 337, 358-59 (1st Cir. 1989)(refusing to address appellee's challenge to district-court disposition of pendent state-law claim because appellee had failed to present issue to district court).

Finally, even if petitioners' had not waived this defense, their contention is baseless. In affirming the district court on local-law grounds, the court of appeals relied on a 1987 decision from the highest court of the District of Columbia that the unanimous panel found "conclusively settled" the issue of respondents' rights under local law. *See* 990 F.2d at 1324 (discussing *Turner v. District of Columbia*, 532 A.2d 662 (D.C. App. 1987)).

CONCLUSION

This case presents no issues concerning comity, federalism, or the proper role of federal courts in overseeing state decisions concerning child-custody issues. Rather, the only question posed by this case is whether a

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[20] Though respondents pleaded violations of District statutory law as a separate cause of action in their complaint and sought separate relief for those violations, petitioners never presented to the district court any issue about respondents' District-law claims. Similarly, after the district court found that petitioners had violated many provisions of District of Columbia law, petitioners failed to present any such issue to the panel of the court of appeals.

federal court can enjoin executive-branch officials from engaging in a willful and pervasive pattern and practice of violating federal and District of Columbia law in the operation of a foster-care system. The court of appeals correctly concluded that a federal court can enjoin such practices. Respondents therefore respectfully urge this Court to deny the petition for a writ of *certiorari*.

Respectfully submitted,

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Dated: December 8, 1993

APPENDIX

CHILD ABUSE PREVENTION AND TREATMENT ACT
(Relevant excerpts)

§5106a. Grants to States for child abuse and neglect prevention and treatment programs

(a) Development and operation grants

The Secretary, through the Center, is authorized to make grants to the States for purposes of assisting the States in developing, strengthening, and carrying out child abuse and neglect prevention and treatment programs.

(b) Eligibility requirements

In order for a State to qualify for a grant under subsection (a) of this section, such State shall --

(1) have in effect a State law relating to child abuse and neglect, including --

(A) provisions for the reporting of known and suspected instances of child abuse and neglect; and

(B) provisions for immunity from prosecution under State and local laws for persons who report instances of child abuse or neglect for circumstances arising from such reporting;

(2) provide that upon receipt of a report of known or suspected instances of child abuse or neglect an investigation shall be initiated promptly to substantiate the accuracy of the report, and, upon a finding of abuse or neglect, immediate steps shall be taken to protect the health and welfare of the abused or neglected child and of any other child under the same care who may be in danger of abuse or neglect;

(3) demonstrate that there are in effect throughout the state, in connection with the enforcement of child abuse and neglect laws and with the reporting of suspected instances of child abuse and neglect, such --

(A) administrative procedures;

(B) personnel trained in child abuse and neglect prevention and treatment;

(C) training procedures;

(D) institutional and other facilities (public and private); and

(E) such related multidisciplinary programs and services,

as may be necessary or appropriate to ensure that the State will deal effectively with child abuse and neglect cases in the State;

(c) ***
(d) ***

(e) Restrictions relating to child welfare services

Programs or projects relating to child abuse and neglect assisted under part B of title IV of the Social Security Act [42 U.S.C. 620 et seq.] shall comply with the requirements set forth in paragraphs (1)(A), (2), (4), (5), and (10) of subsection (b) of this section.

(f) ***

ADOPTION ASSISTANCE AND CHILD WELFARE ACT of 1980
(Relevant Excerpts)

§627. Foster care protection required for additional payments

(a) Requisite additional steps to qualify

If, for any fiscal year after fiscal year 1979, there is appropriated under section 620 of this title a sum in excess of $141,000,000, a State shall not be eligible for payment from its allotment in an amount greater than the

amount for which it would be eligible if such appropriation were equal to $141,000,000, unless such State --

(1) has conducted an inventory of all children who have been in foster care under the responsibility of the State for a period of six months preceding the inventory, and determined the appropriateness of, and necessity for, the current foster placement, whether the child can be or should be returned to his parents or should be freed for adoption, and the services necessary to facilitate either the return of the child or the placement of the child for adoption or legal guardianship; and

(2) has implemented and is operating to the satisfaction of the Secretary --

(A) a statewide information system from which the status, demographic characteristics, location, and goals for the placement of every child in foster care or who has been in such care within the preceding twelve months can readily be determined;

(B) a case review system (as defined in section 675(5) of this title) for each child receiving foster care under the supervision of the State; and

(C) a service program designed to help children, where appropriate, return to families from which they have been removed or be placed for adoption or legal guardianship.

(b) Reduction of allotment

If, for each of any two consecutive fiscal years after the fiscal year 1979, there is appropriated under section 620 of this title a sum equal to $325,000,000, each State's allotment amount for any fiscal year after such two consecutive fiscal years shall be reduced to an amount equal to its allotment amount for the fiscal year 1979, unless such State --

(1) has completed an inventory of the type specified

in subsection (a)(1) of this section;

(2) has implemented and is operating the program and systems specified in subsection (a)(2) of this section; and

(3) has implemented a preplacement preventive service program designed to help children remain with their families.

(c) ***

§671. State plan for foster care and adoption assistance

(a) Requisite features of State plan

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which --

(1) provides for foster care maintenance payments in accordance with section 672 of this title and for adoption assistance in accordance with section 673 of this title;

(2) provides that the State agency responsible for administering the program authorized by part B of this subchapter shall administer, or supervise the administration of, the program authorized by this part;

(3) provides that the plan shall be in effect in all political subdivisions of the state, and, if administered by them, be mandatory upon them;

(4) provides that the State shall assure that the programs at the local level assisted under this part will be coordinated with the programs at the State or local level assisted under parts A and B of this subchapter, under subchapter XX of this chapter, and under any other appropriate provision of Federal law;

(5) provides that the State will, in the administration

of its programs under this part, use such methods relating to the establishment and maintenance of personnel standards on a merit basis as are found by the Secretary to be necessary for the proper and efficient operation of the programs, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, or compensation of any individual employed in accordance with such methods;

(6) provides that the State agency referred to in paragraph (2)(hereinafter in this part referred to as the "State agency") will make such reports, in such form and containing such information as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports;

(7) provides that the State agency will monitor and conduct periodic evaluations of activities carried out under this part;

(8) provides safeguards which restrict the use of or disclosure of information concerning individuals assisted under the State plan to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part A, B, C, or D of this subchapter (including activities under part F of this subchapter) or under subchapter I, V, X, XIV, XVI (as in effect in Puerto Rico, Guam, and the Virgin Islands), XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, of services, directly to individuals on the basis of need, (D) any audit or similar activity conducted in connection with the administration of any such plan or program by any governmental agency which is authorized

by law to conduct such audit or activity, and (E) reporting and providing information pursuant to paragraph (9) to appropriate authorities with respect to known or suspected child abuse or neglect; and the safeguards so provided shall prohibit disclosure, to any committee or legislative body (other than an agency referred to in clause (D) with respect to an activity referred to in such clause), of any information which identifies by name or address any such applicant or recipient; except that nothing contained herein shall preclude a State from providing standards which restrict disclosures to purposes more limited than those specified herein, or which, in the case of adoptions, prevent disclosure entirely;

(9) provides that the State agency will --

(A) report to an appropriate agency or official, known or suspected instances of physical or mental injury, sexual abuse or exploitation, or negligent treatment or maltreatment of a child receiving aid under part B of this subchapter or this part under circumstances which indicate that the child's health or welfare is threatened thereby; and

(B) provide such information with respect to a situation described in subparagraph (A) as the State agency may have;

(10) provides for the establishment or designation of a State authority or authorities which shall be responsible for establishing and maintaining standards for foster family homes and child care institutions which are reasonably in accord with recommended standards of national organizations concerned with standards for such institutions or homes, including standards related to admission policies, safety, sanitation, and protection of civil rights, and provides that the standards so established shall be applied by the State to any foster family home or child care institution receiving funds under this part

or part B of this subchapter;

(11) provides for periodic review of the standards referred to in the preceding paragraph and amounts paid as foster care maintenance payments and adoption assistance to assure their continuing appropriateness;

(12) provides for granting an opportunity for a fair hearing before the State agency to any individual whose claim for benefits available pursuant to this part is denied or is not acted upon with reasonable promptness;

(13) provides that the State shall arrange for a periodic and independently conducted audit of the programs assisted under this part and part B of this subchapter, which shall be conducted no less frequently than once every three years;

(14) provides (A) specific goals (which shall be established by State law on or before October 1, 1982) for each fiscal year (commencing with the fiscal year which begins on October 1, 1983) as to the maximum number of children (in absolute numbers or as a percentage of all children in foster care with respect to whom assistance under the plan is provided during such year) who, at any time during such year, will remain in foster care after having been in such care for a period in excess of twenty-four months, and (B) a description of the steps which will be taken by the State to achieve such goals;

(15) effective October 1, 1983, provides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home;

(16) provides for the development of a case plan (as defined in section 675(1) of this title) for each child receiving foster care maintenance payments under the State plan and provides for a case review system which

meets the requirements described in section 675(5)(B) of this title with respect to each such child; and

(17) provides that, where appropriate, all steps will be taken, including cooperative efforts with the State agencies administering the plans approved under parts A and D of this subchapter, to secure an assignment to the State of any rights to support on behalf of each child receiving foster care maintenance payments under this part.

§675. Definitions

As used in this part or part B of this subchapter:

(1) The term "case plan" means a written document which includes at least the following:

(A) A description of the type of home or institution in which a child is to be placed, including a discussion of the appropriateness of the placement and how the agency which is responsible for the child plans to carry out the voluntary placement agreement entered into or judicial determination made with respect to the child in accordance with section 672(a)(1) of this title.

(B) A plan for assuring that the child receives proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents' home, facilitate return of the child to his own home or the permanent placement of the child, and address the needs of the child while in foster care, including a discussion of the appropriateness of the services that have been provided to the child under the plan.

(C) To the extent available and accessible, the health and education records of the child, including --

(i) the names and addresses of the child's

health and educational providers;

(ii) the child's grade level performance;

(iii) the child's school record;

(iv) assurances that the child's placement in foster care takes into account proximity to the school in which the child is enrolled at the time of placement;

(v) a record of the child's immunizations;

(vi) the child's known medical problems;

(vii) the child's medications; and

(viii) any other relevant health and education information concerning the child determined to be appropriate by the State agency.

Where appropriate, for a child age 16 or over, the case plan must also include a written description of the programs and services which will help such child prepare for the transition from foster care to independent living.

(2) The term "parents" means biological or adoptive parents or legal guardians, as determined by applicable State law.

(3) The term "adoption assistance agreement" means a written agreement, binding on the parties to the agreement, between the State agency, other relevant agencies, and the prospective adoptive parents of a minor child which at a minimum (A) specifies the nature and amount of any payments, services, and assistance to be provided under such agreement, and (B) stipulates that the agreement shall remain in effect regardless of the State of which the adoptive parents are residents at any given time. The agreement shall contain provisions for the protection (under an interstate compact approved by the Secretary or otherwise) of the interests of the child in cases where the adoptive parents and child move

to another State while the agreement is effective.

(4) (A) The term "foster care maintenance payments" means payments to cover the cost of (and the cost of providing) food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, and reasonable travel to the child's home for visitation. In the case of institutional care, such term shall include the reasonable costs of administration and operation of such institution as are necessarily required to provide the items described in the preceding sentence.

(B) In cases where --

(i) a child placed in a foster family home or child-care institution is the parent of a son or daughter who is in the same home or institution, and

(ii) payments described in subparagraph (A) are being made under this part with respect to such child,

the foster care maintenance payments made with respect to such child as otherwise determined under subparagraph (A) shall also include such amounts as may be necessary to cover the cost of the items described in that subparagraph with respect to such son or daughter.

(5) The term "case review system" means a procedure for assuring that --

(A) each child has a case plan designed to achieve placement in the least restrictive (most family like) setting available and in close proximity to the parents' home, consistent with the best interest and special needs of the child,

(B) the status of each child is reviewed periodically but no less frequently that once every six months by either a court or by administrative review

(as defined in paragraph (6)) in order to determine the continuing necessity for and appropriateness of the placement, the extent of compliance with the case plan, and the extent of progress which has been made toward alleviating or mitigating the causes necessitating placement in foster care, and to project a likely date by which the child may be returned to the home or placed for adoption or legal guardianship,

(C) with respect to each such child, procedural safeguards will be applied, among other things, to assure each child in foster care under the supervision of the State of a dispositional hearing to be held, in a family or juvenile court or another court (including a tribal court) of competent jurisdiction, or by an administrative body appointed or approved by the court, no later than eighteen months after the original placement (and periodically thereafter during the continuation of foster care), which hearing shall determine the future status of the child (including, but not limited to, whether the child should be returned to the parent, should be continued in foster care for a specified period, should be place for adoption, or should (because of the child's special needs or circumstances) be continued in foster care on a permanent or long-term basis) and, in the case of a child who has attained age 16, the services needed to assist the child to make the transition from foster care to independent living; and procedural safeguards shall also be applied with respect to parental rights pertaining to the removal of the child from the home of his parents, to a change in the child's placement, and to any determination affecting visitation privileges of parents; and

(D) a child's health and education record (as described in paragraph (1)(A)) is reviewed and up-

dated, and supplied to the foster parent or foster care provider with whom the child is placed, at the time of each placement of the child in foster care.

(6) The term "administrative review" means a review open to the participation of the parents of the child, conducted by a panel of appropriate persons at least one of whom is not responsible for the case management of, or the delivery of services to, either the child or the parents who are the subject of the review.

THE DISTRICT OF COLUMBIA PREVENTION OF CHILD ABUSE AND NEGLECT ACT OF 1977

§6-2102. Handling of reports -- By Division

(a) ***

(b) The Division shall commence an investigation of all reports alleging neglect other than abuse within 24 hours of the receipt of the report except that when:

(1) A report alleges that a child is left alone or with inadequate supervision, the Division shall commence an investigation immediately. If the Division is unable to dispatch a worker to the child forthwith, it shall inform the police of the report;

(2) A report indicates the existence of an immediate danger to a child and the immediate removal of the child from his or her surroundings appears necessary despite the available resources, the Division shall inform the police of the contents of the report and request the police to investigate. The Division shall immediately commence a social investigation.

(c) ***

§6-2107. Social investigation; services; report

(a) ***

(b) If there is a supported report, the agency responsible

for the social investigation shall as soon as possible prepare a plan for each child and family for whom services are required on more than an emergency basis and shall forthwith take such steps to ensure the protection of the child and the preservation, rehabilitation and, when appropriate, reunification of the family as may be necessary to achieve the purposes of this act. Such steps may include but need not be limited to: (1) Arranging for necessary protective, rehabilitative and financial services to be provided to the child and the child's family in a manner which maintains the child in his or her home; (2) referring the child and the child's family for placement in a family shelter or other appropriate facility; (3) securing services aimed at reuniting (with his or her family) a child taken into custody; (4) providing or making specific arrangements for the case management of each case when child protective services are required. To the maximum extent possible, the resources of the community (public and private) shall be utilized for the provision of services and case management.

(c) ***

§6-2111. Establishment; purposes; staff

(a) There is hereby established a Child Protection Register to be maintained by the Division.

(b) The purposes of the Register are to:

(1) Maintain a confidential index of cases of abused and neglected children;

(2) Assist in the identification and treatment of abused and neglected children and their families; and

(3) Serve as a resource for the evaluation, management, and planning of programs and services for abused and neglected children.

(c) The staff of the Department of Human Services as-

signed to maintain the Child Protection Register shall maintain 24-hour, 7 day-a-week telephone lines which may be combined with the 24-hour intake components described in subchapter III of this chapter.

(d) Said staff shall:

(1) Receive reports and information necessary for the operation of the Child Protection Register and make appropriate entries in such Register as required by §6-2112(a); and

(2) Release information contained in the Child Protection Register in a manner consistent with this act. (1973 Ed., §6-2111; Sept. 23, 1977, D.C. Law 2-22, title II, §201, 24 DCR 3341.)

§6-2122. Organization

(a) ***

(b) ***

(c) The Division shall have sufficient staff, supervisory personnel, and resources to accomplish the purposes of this act, including the capacity to provide emergency and continuing service resources to abused and neglected children and their families.

(d) Staff qualifications, caseload levels, and supervision requirements shall be guided by standards set by the Child Welfare League of America or other child welfare organizations, shall be published in the District of Columbia Register for public comments, and shall be reviewed by the mayor's Interagency interdepartmental Committee on Abuse and Neglect.

(e) ***

§6-2123. Duties and responsibilities

(a) The Chief of the Division shall have the following duties and responsibilities, any of which may be contract-

ed for with private or other public agencies:

(1) To receive and investigate reports of neglect as provided in §103 of this act, and §§6-2102 and 6-2104 and to assist in the determination of the need for the removal of an abused child as provided in §6-2105;

(2) Within 90 days of taking a child into custody pursuant to paragraph (1) of subsection (c) of §6-2124, to return the child to the home or to request the filing of a neglect petition in the Family Division of the Superior Court of the District of Columbia;

(3) To maintain a program of treatment and services for families of neglected and abused children;

(4) To prepare annually a plan for child protective services which shall be reviewed and commented on by the Mayor's Committee on Child Abuse and Neglect. The plan shall:

(A) Describe the division's implementation of this act, including its organization, staffing, method of operations and financing, and programs and procedures for the receipt, investigation and verification of reports;

(B) Describe the provisions for the determination of protective and the treatment of ameliorative service needs, and the provision of such services;

(C) State the guidelines for referrals to the Family Division of the Superior Court of the District of Columbia; and

(D) State the provisions for monitoring, evaluation and planning. The 1st plan shall be made available to the public within 90 days of September 23, 1977;

(5) To encourage and assist in the formation of child abuse/neglect teams in hospitals, health and mental health clinics and other appropriate facilities in the

District of Columbia; and

(6) To take whatever additional actions are necessary to accomplish the purposes of this act.

(b) The Director of the Department of Human Services, in addition to his or her other responsibilities, shall have the following duties and responsibilities, any of which may be contracted for with private or other public agencies:

(1) When a child has been adjudicated a neglected child and committed to the Department of Human Services, to offer rehabilitative services to the child's family;

(2) When rehabilitative services have failed to reunite a committed child and his or her family within a reasonable time, to prepare a permanent plan for the child;

(3) To establish or attempt to secure priority access for protective service clients, by contract or agreement with private organizations, other public agencies, or other Department of Human Services units, to services necessary for the preservation or reunification of families. These services may include but shall not be limited to:

(A) Emergency financial aid;

(B) Emergency caretakers;

(C) Homemakers;

(D) Family shelters;

(E) Emergency foster homes;

(F) Facilities providing medical, psychiatric or other therapeutic services;

(G) Day care;

(H) Parent aides/lay therapists;

(4) To monitor and evaluate services to and needs

of neglected children and their families;

(5) To compile and publish training materials and provide technical assistance on neglect prevention, identification and treatment; and

(6) To prepare and submit to the Mayor, the Council of the District of Columbia, and the public an annual report which shall include a description of the specific actions taken to implement this act and an evaluation of the Division's performance. The report shall include a full statistical analysis of case reports received, an evaluation of services offered, recommendations for additional legislation or services needed to fulfill the purposes of this act and the comments submitted by the Mayor's Interagency Interdepartmental Committee on Abuse and Neglect. The 1st report shall be submitted not later than 1 year and 90 days after September 23, 1977. (1973 Ed., §6-2133; Sept. 23, 1977, D.C. Law 2-22, title III, §303, 24 DCR 3341.)

§6-2124. Services authorized; custodial placement; removal of child

(a) When an investigation made pursuant to §§6-2102 and 6-2103 indicates that a child is an abused or neglected child and in need of services, the Chief of the Division is authorized to provide or secure any necessary services which may include:

(1) Emergency financial aid;

(2) Temporary 3rd-party placement with responsible neighbors or relatives for the child and his or her siblings: Provided, that the person with whom the child is placed shall not be considered an agent of the Department of Human Services;

(3) Emergency caretaker(s) who enter the home and provide temporary care for the child and his or her siblings in appropriate cases, when the consent of the par-

ent or other custodian cannot be obtained, notwithstanding the provisions of the Act of March 3, 1901, as amended (31 Stat. 1324);

(4) The placement of homemakers in the home to maintain the child and his or her siblings or to assist the parent or other caretaker in discharging his or her responsibilities to the child;

(5) Day care for the child and his or her siblings;

(6) Counselling services for the child and his or her family;

(7) Medical evaluation and/or emergency treatment of the child by a qualified physician; and

(8) Other appropriate services or resources available in the community.

(b) When an investigation indicates that a child has been left alone or with inadequate supervision and a 3rd-party placement cannot be made, the Division is authorized to make a temporary custodial placement of the child: Provided, that:

(1) Notice is left for the parent or custodian which shall state the procedure for reclaiming the child;

(2) Efforts continue to locate the parent;

(3) The child is returned forthwith upon the request of the parent or custodian, unless there is additional evidence of immediate danger to the child and police action is taken pursuant to §16-2309 (3) or 94); and

(4) A complaint alleging neglect is filed with the Superior Court of the District of Columbia:

(A) At the end of 5 days if the parent or custodian fails to claim the child within that time; or

(B) Immediately upon the discovery of additional evidence of immediate danger to the child.

(c) When an investigation made pursuant to §6-2102 or 6-2103 indicates that a child is an abused or a neglected child and when it has been determined that the child cannot be adequately protected by any of the services set forth in subsection (a) or (b) of this section or by any other services, the Chief of the Division is authorized to:

(1) Remove the child with the consent of the parent, guardian, or other person acting in loco parentis;

(2) Request the Corporation Counsel of the District of Columbia to petition the Family Division of the Superior Court of the District of Columbia for a finding of neglect and, where appropriate, the removal of the child; and

(3) Request the police to remove the child when the consent of a parent, guardian or other custodian cannot be obtained and the need to protect the child does not allow sufficient time to obtain a court order. (1973 Ed., §6-2134; Sept. 23, 1977, D.C. Law 2-22; title III, §304, 24 DCR 3341.)

§16-2323. Review of dispositional orders

(a) When a child has been adjudicated neglected and a dispositional order has been entered by the Division, the Division shall hold a review hearing.

(1) at least every six (6) months for a child under the age of six (6) years who is committed to the custody of an agency, department, or institution;

(2) at least every six (6) months for a child of any age who is committed to the custody of an agency, department, or institution but has not been committed for longer than two (2) years;

(3) at least every year for all other children.

(b) ***

(c) ***

(d) ***

THE DISTRICT OF COLUMBIA YOUTH RESIDENTIAL FACILITIES LICENSURE ACT OF 1986

(Relevant Excerpts)

§3-802. License requirements

(a) Except as provided in subsections (b) and (c) of this section, it shall be unlawful to operate a facility in the District, whether public or private, for profit or not for profit, without being licensed by the Mayor. Each facility shall be licensed by both its type and the level(s) of care provided.

(b) Facilities that, before August 13, 1986, were not or would not have been subject to District licensure may operate without a license until 6 months after the issuance of applicable rules under §3-803.

(c) The continued operation of a facility pending action by the Mayor on an application for licensure renewal or initial licensure under subsection (b) of this section shall not be deemed unlawful if a completed application was timely filed but, through no fault of the facility's administrator or adult caregiver(s), the Mayor has failed to act on the application before the expiration of the facility's current license or, under subsection (b) of this section, its authorized period of operation. A facility operating under this subsection shall comply with all other provisions of this chapter and rules issued pursuant to this chapter.

(d) Application forms shall include copies of all certificates of approval, authority, occupancy, or need that are required as a precondition to lawful operation in the District.

(e) A license shall be valid only for the person(s), address, type of facility, and level(s) of care stated on the license.

(f) A license shall, whenever possible, give the Mayor at least 60 days advance written notice before transferring ownership of a facility, including, in the case of a corporate licensee, any transfer of the legal or beneficial ownership of 10% or more of the stock of the corporation. Upon notification, the Mayor may conduct an investigation or require reinspection to ensure that the facility will remain in compliance with this chapter, the rules issued pursuant to this chapter, and all other applicable laws.

(g) Unless sooner terminated or renewed, a license required by this chapter shall expire 1 year from the date it was issued or last renewed.

(h) A facility shall promptly honor all requests by District government officials, residents, and members of the public to inspect its license. (Aug. 13, 1986, D.C. Law 6-139, §3, 33 DCR 3804.)

§3-803. Rules

(a) The Mayor shall, no later than 12 months after August 13, 1986, and pursuant to subchapter I of Chapter 15 of Title 1, issue all rules necessary to carry out the purposes of this chapter. These rules may categorize and define the various types of facilities, may establish licensure fees, and shall at a minimum include:

(1) Procedures governing the issuance, renewal, conversion, suspension, and revocation of licenses, the orderly transfer and discharge of residents, the receipt and investigation of complaints or allegations of abuse, the issuance of variances, and appeals from licensure-related decisions;

(2) A statement of residents' rights and responsibili-

ties for each type of facility;

(3) Standards for continuing care, emergency care, therapeutic care, and aftercare; and

(4) Standards for each type of facility, including (when applicable), but not necessarily limited to:

(A) Programmatic standards with respect to educational, rehabilitative, and mental health services, recreational activities, parental and family involvement, the use of discipline and restraint, and the prevention of abuse;

(B) Personnel and staffing standards with respect to the ratio of staff to residents, caregiver qualifications, and ongoing staff and volunteer training;

(C) Personal care standards with respect to resident nutrition, hygiene, and emergency and routine health care;

(D) Confidentiality and privacy standards with respect to a resident's person, property, living quarters, case records, and subjection to searches for contraband;

(E) Safety and sanitation standards with respect to all parts of the facility and grounds, fire protection and prevention, first aid, and the facility's electrical, heating, cooling, ventilation, and water systems;

(F) Environmental, structural, and architectural standards; and

(G) Administrative standards with respect to resident admissions and discharges, operating procedures, fiscal management, complaint investigation and review, quality assurance, recordkeeping, and reporting.

(b) The standards adopted under subsection (a)(4)(A) of this section shall reflect a strong presumption that parental and family contact is in a resident's best interest and that active parental and family involvement is essential to a resident's care.

(c) The Mayor shall ensure that, no later than 6 months after the issuance of rules under subsection (a) of this section, all facilities shall be licensed in accordance with those rules.

(d) No later than 30 days after August 13, 1986, the Mayor shall appoint an advisory task force composed of social service, mental health, and education professionals, child welfare advocates, facility providers, community representatives, and representatives from relevant District government agencies. Within a time frame established by the Mayor, this task force shall formulate and present to the Mayor detailed, proposed standards for the rules required by subsection (a)(2) through (4) of this section. The Mayor shall give substantial weight to the task force's recommendations and shall, on a regular basis before publication of proposed rules, maintain a formal, structured dialogue with task force representatives while reviewing and acting on those recommendations.

(e)(1) The Mayor may, upon a showing of extreme hardship and manifest public need and if not inconsistent with other provisions of this chapter or deleterious to resident health, safety, or welfare, grant variances to private facilities with respect to the standards established under subsection (a)(3) and (4) of this section. The Mayor shall maintain a public record listing all variances granted under this subsection and containing a complete written explanation of the basis for each variance.

(2) The Mayor shall not issue variances to facilities owned or operated by the District government. (Aug. 13, 1986, D.C. Law 6-139, §4, 33 DCR 3804.)

§3-805. Inspections

(a) (1) To ensure that each new facility will be in compliance with this chapter, the rules issued pursuant to this chapter, and all other applicable laws, the Mayor shall conduct an on-site inspection before a facility's initial licensure. Instead of issuing a full-year license to a new facility or licensee, the Mayor may issue a provisional license under §3-807(b) pending satisfactory completion of additional, follow-up inspections. After initial licensure, the Mayor shall conduct at least 1 on-site inspection before each licensure renewal.

(2) The Mayor shall at least once a year inspect all facilities caring for District children outside the District to ensure that each of these facilities is in substantial compliance with this chapter, the rules issued pursuant to this chapter, and all other applicable laws. One year after the issuance of rules under §3-803, the Mayor shall report to the Council on the cost and efficacy of implementing this paragraph and on the extent to which facilities caring for District children outside the District are required by their respective jurisdictions to meet licensure standards comparable to those adopted under §3-803. Within 45 days after receiving the Mayor's report, the Council shall determine whether this paragraph should be amended to authorize the Mayor to accept licensure by other jurisdictions in lieu of conducting annual inspections.

(b) The Mayor may at any reasonable hour enter a facility for the purpose of conducting an announced or unannounced inspection to check for compliance with this chapter, a rule issued pursuant to this chapter, or any other District or locally enforceable federal law. When conducting an inspection, especially of a foster home, the Mayor shall respect the homelike atmosphere of the facility and the reasonable privacy interests of its residents and adult caregivers.

(c) Any District government employee who, while visiting a facility for the purpose of casework or monitoring, observes a condition that he or she believes in violation of this chapter, a rule issued pursuant to this chapter, or any other district or federal law shall, no later than 7 days after making the observation and if not previously reported, report this suspected violation to the Department of Consumer and Regulatory Affairs ("DCRA").

(d) The Mayor shall make all licensure and inspection reports available to the public upon request and shall notify all child-placing agencies in the District whenever a facility's license is suspended, revoked, converted to a provisional or restricted license, or not renewed. (Aug. 13, 1986, D.C. Law 6-139, §6, 33 DCR 3804.)

DEC 17 1993

No. 93-724

In the Supreme Court of the United States

OCTOBER TERM, 1993

SHARON PRATT KELLY, *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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INTRODUCTION

The D.C. Circuit has ordered a federal district court to enforce the child-abuse-and-neglect laws of the District of Columbia and to supervise the District's management of its foster-care system under these local laws. The Honorable Thomas F. Hogan now acts as a federal adjunct to the independent judicial system of the District of Columbia and as an overseer of litigation in that forum. The D.C. Circuit has ordered these actions even though (1) it declined to find that there was any federal interest in this case; (2) Congress has given the District of Columbia judiciary exclusive jurisdiction of neglect and adoption matters; (3) family-law matters are matters of vital local concern; (4) Judge Hogan himself declined to exercise pendent jurisdiction in this case; and (5) the D.C. Circuit's decision encroaches on the power of the District's independent judiciary to interpret and apply local law.

Despite these facts, respondents would have this Court believe that the D.C. Circuit's decision constitutes "business as usual" in a federal court. Nothing could be further from

the truth. Respondents also suggest that this Court should ignore the important issues presented by this case because children in the District's foster-care system are victims of constitutional violations. The D.C. Circuit, however, declined to make any such ruling. Finally, respondents offer a number of other reasons why this Court should not review the decision below. None of them withstands scrutiny.

I. THIS CASE CONCERNS CHILD-CUSTODY DECISIONS

Respondents assert that the District is "misleading" this Court by its argument "that this case concerns issues of child custody, of whether children should be left at home or removed from their parents, and of whether parental rights should be terminated in individual cases so that children can be legally freed for adoption." Opp. 10-11. Respondents admit, however, that such decisions "are difficult, subjective decisions that should be left to the discretion of individual caseworkers in the District of Columbia and to its courts." Opp. 11.

Respondents' assertion that this case does not concern difficult, subjective child-custody decisions is contradicted by the opinions below, the arguments they have made in this litigation, and the evidence they introduced at trial in support of their claims that the District's child-neglect and foster-care system is legally deficient.

A. The Opinions & Legal Arguments Below.

The Opinions below themselves demonstrate that this case does involve child-custody decisions that traditionally have been made by specialized local family law courts. As the D.C. Circuit and Judge Hogan ruled, the District's "transgressions" in this case include " 'the failure to provide services to families to prevent the placement of children in foster care, the failure to place those who may not safely remain at home in appropriate foster homes and institutions, . . . and the failure to move children into a situation of permanency, whether by returning them to their homes or freeing them for adoption' " Pet. App. 3a, quoting Pet. App. 17a. See also

Pet. App. 47a (the rights of Demerick B.'s mother should have been terminated years ago to permit him to realize his right to be adopted).

Respondents' position here is also contradicted by the positions they have taken elsewhere in the course of this litigation. As recently as November 10, 1993, for example, Marcia Robinson Lowry, counsel for respondents, in a hearing before Judge Hogan on the permissible scope of the remedial decree following the D.C. Circuit's liability decision, was pleased to inform him that the decision did not require alteration of any part of his prior remedial decree governing adoption. She stated: "[T]he Court of Appeals could have conceivably, although I think not in reality, ruled that adoption was not within the subject matter jurisdiction of this Court, in which case that provision of the order would not be in effect." Transcript 19. Earlier, Elizabeth S. Symonds, also counsel for respondents, urged that the conduct of child-custody litigation in the District of Columbia Court of Appeals is subject to Judge Hogan's oversight. In an appeal filed by the mother of Demerick B., one of the named plaintiffs, she challenged the adoptive status of her child on due process grounds, and Ms. Symonds urged that Judge Hogan's order required the District's appellate attorneys to take action to ensure his prompt adoption. See Dist. Reply Br. (D.C. Cir.) App. A.[1]

B. Respondents' Own Evidence At Trial.[2]

Respondents' own evidence at trial also demonstrates that this case involves child custody matters that are the *raison*

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[1] According to Ms. Symonds, "Because Judge Hogan's order in *LaShawn* contains explicit provisions designed to ensure the well-being of the named plaintiffs, we believe that the District must give this matter high priority and devote appropriate legal resources to ensuring that this appeal is disposed of quickly and that Demerick's adoption is promptly finalized."

[2] This evidence came from respondents' experts, Clarice Dibble Walker, then an Associate Professor, Howard University School of Social Work; and Dr. William B. Clotworthy and Dr. Harold Eist, child psychiatrists. Professor Walker is now employed by the District and is a petitioner in this Court.

d'etre of the District's family law court. This point is illustrated by the following summary of respondents' evidence concerning Kevin E., a named plaintiff, who was found to be "representative" of the class. Pet. App. 25a.

Kevin's mother was 15 years old when she gave birth to him in August 1979. As an adolescent, she had spent three years in St. Elizabeths Hospital, a mental institution, and, after Kevin was born, she was again admitted several times.

Prior to Kevin's birth, his mother had decided to put him up for adoption but she changed her mind. She was unable to bring Kevin home, however, because her own father, with whom she lived, would not permit it. As a result, the District assumed custody of Kevin and placed him in the care of St. Ann's Infant and Maternal Home. Kevin remained at St. Ann's for a little over a year and, on September 8, 1980, he was placed with a family who planned to adopt him. Kevin remained with this family for two years until his foster parents' marriage fell apart. After being placed in another foster home for six weeks, he was placed with his mother in a home for teenage mothers and their children. His mother was unable to care for him even in this setting. Kevin, then three years old, was placed in another adoptive home where he remained for four years. During this time, he received psychotherapy as well as medication to control the Attention Deficit-Hyperactivity Disorder with which he was born. At the age of seven, Dr. Clotworthy testified, Kevin's "foster home gave up on him, asked him to be removed, and added insult to injury by saying they were going to adopt another foster child . . . living with them at the same time Kevin lived with them." The District again found an adoptive home for Kevin where he remained for a year and one-half, when his foster parents asked that he be removed and told him that they were going to adopt another child who had been living with them.

Kevin became psychotic. The District sent him to Children's Hospital and to St. Elizabeths Hospital for treatment. Kevin was then moved to "Villa Maria, a residential treatment center in Baltimore, the most extensive kind of

therapeutic intervention there is except for hospitalization." According to Dr. Clotworthy, "Villa Maria has helped him . . . [s]o he was in good shape when I saw him."

At trial, Professor Walker criticized the District for placing Kevin at St. Ann's. Dr. Clotworthy, in turn, criticized the District for placing him in an adoptive family when he was 13 months old: Unless the District had been able to place him with a foster family before he was six months old, Kevin should have remained at St. Ann's until he was two or two-and-one-half years old to ensure constancy in his care. Furthermore, although it was recognized that Kevin had low self-esteem when he was four years old, there was a nine-month delay in securing medication for Kevin and a year's delay in securing psychiatric help.

There were other criticisms. Professor Walker faulted the District for not making "consistent efforts to ensure" that Kevin was placed in an adoptive home. Dr. Clotworthy criticized the District for allowing Kevin's mother to visit him. These visits, as did his brief stay with his mother, raised false hopes that they would be reunited. In Dr. Clotworthy's view, Kevin would have been better off had his mother's "rights been terminated years before." "Indeed," stated Dr. Clotworthy, "I think that the law puts far too much emphasis on the rights of the parents."

In short, respondents' own evidence demonstrates that this case does involve difficult, subjective decisions concerning the custody and care of children whose parents, at any particular time, may not be capable of caring for them, willing to care for them, or both. This evidence also demonstrates that the claims of the children in this case who are parties to ongoing proceedings in the Family Division are claims that may be heard in the Family Division.[3] See Pet. 4-7.

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[3] The evidence concerning Kevin, which is typical of the evidence in this case, also makes clear that, even when the hindsight (and conflicting) opinions of respondents' experts are considered, Judge Hogan erred in ruling that the District operated its foster-care system in an unconstitutional fashion.

II. REVIEW OF THE D.C. CIRCUIT'S *YOUNGER* ABSTENTION RULING IS NECESSARY AND APPROPRIATE.

A. *Younger* Abstention Is A Flexible Concept.

Respondents seek to distinguish *Younger v. Harris*, 401 U.S. 37 (1971), and *Moore v. Sims*, 442 U.S. 424 (1979), on the ground that, in contrast to those cases, they "sought injunctive relief against executive branch officials to assure executive-branch compliance with statutory and constitutional obligations imposed upon these officials." Opp. 14. *Younger* and *Moore* are not distinguishable on that ground.

In *Younger*, the federal plaintiffs brought suit solely against an executive branch official — a state prosecutor — seeking to ensure compliance with what they believed to be their constitutional rights. In *Moore*, the federal plaintiffs sought to enjoin the Texas Department of Human Resources (and other unspecified defendants) seeking to ensure compliance with what they believed to be their constitutional rights. Here, the federal plaintiffs sought to enjoin the District's chief executive official, its Mayor, and officials of its Department of Human Services ("DHS") to ensure compliance with what they believed to be their legal rights.

Younger and *Moore*, far from announcing a rigid, narrow concept of abstention, recognize that federal-court injunctions against state executive officials at the behest of persons who are parties to local court proceedings can present unacceptable risks to the fair and orderly disposition of disputes by local court systems. These cases require a federal court to stay its hand when it is asked to consider federal (and *a fortiori* local) claims asserted by children who are parties to proceedings in the Family Division of the District's Superior Court where they have an opportunity to raise these claims.[4]

[4] Respondents also assert that the District has limited its abstention argument to their federal constitutional claims and that this approach undermines its abstention argument because it would require a federal district court to "split" their federal claims. Opp. 12 n.11. This assertion is wrong. See Pet. 24 n.12. *See also Winston*, *infra*, 948 F.2d at 1401 n.10 (a federal court may have to abstain under *Moore* from deciding federal statutory challenges that may be raised in ongoing state court proceedings) (Garth, J., dissenting).

B. Respondents Have Not Demonstrated That District Law Bars Them From Raising Their Constitutional Claims.

Respondents emphasize that the D.C. Circuit found that "'[e]very claim supported by federal law is also supported by District law.' " Opp. 18, quoting Pet. App. 9a. At the same time, however, they urge that abstention is not required with respect to children subject to the protection of the Family Division because these children do not have the opportunity to raise their federal claims in that court. The latter assertion is plainly wrong.

This Court has ruled that state-court litigants may invoke a federal forum only if they demonstrate that a state rule bars them from presenting their federal claims in ongoing state proceedings to which they are parties. *See, e.g., Moore, supra*, 442 U.S. at 430; *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 14 (1987). Here, however, those respondents who are parties to Family Division proceedings have merely asserted that their constitutional claims may not be raised in that forum. They have not cited a single District rule that bars litigation of these claims in the Family Division.[5] Nor, despite four years of litigation and the fact that all children protected by the Family Division are members of the class here, have they identified a single case in which the Family Division has ruled that a constitutional claim made here could not be raised there or offered a single concrete example of such a claim made here that could not have been raised there.

Furthermore, the local trial court cases found by the D.C. Circuit do not demonstrate that District law bars parties to neglect and related proceedings from raising in those proceedings the issues raised here, *e.g.*, whether they have a right to remain with, or be returned to, their parent(s). The first case (*In re N.P. and L.W.* (1982)) merely states the unexceptional proposition that neglect proceedings " 'center[] on

[5] The absence of a class action device in the Family Division, by which individual constitutional claims may be aggregated, obviously does not bar litigation of those claims. *See Gen'l Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147 (1982).

the care of a child by his or her parent' " and extend to " 'related matters involving the same family or household,' " but not beyond that point. Pet. App. 6a-7a. The second case (*In re Brim* (1984)) merely states that the Family Division is not a proper forum for raising a claim that DHS has mishandled Social Security Disability payments it has collected on behalf of a neglected child. Pet App. 7a. However, despite all the District's alleged failings, there is no such claim here.

C. Importance of *Younger* Abstention Issue.

Respondents, without addressing the decisions of the Sixth and Eighth Circuits, which the District cited as being in conflict with the decision below (Pet. 18-20), nevertheless urge that the federal courts have uniformly ruled that *Younger* abstention is not required in a case like this. In support of this claim, they cite one appellate decision, *Winston v. Children and Youth Services*, 948 F.2d 1380 (3rd Cir. 1991), *cert. denied*, 112 S. Ct. 2303 (1992).

Winston, however, does not support respondents' claim. In *Winston*, the state prevailed on the merits after trial in a case challenging, on federal constitutional and statutory grounds, parental visitation policies for children found by the local family law court to be neglected. On appeal by the parents, the court, in a two-to-one decision, held that the state had waived its abstention argument by failing to take a cross-appeal. Here, of course, the District took an appeal.[6]

III. THE ISSUE OF PENDENT JURISDICTION IS PROPERLY BEFORE THIS COURT.

Respondents wrongly claim that the issue of pendent jurisdiction is not properly before this Court. Opp. 19.

The District dealt with the issue of a private right of action under local law on appeal. Thus, respondents, although not taking a cross-appeal, urged the D.C. Circuit to abstain from

[6] On the merits of the abstention argument, the District refers the Court to Judge Garth's dissent in *Winston* for a reasoned and persuasive analysis of why abstention is required in a case like this one. *See* 948 F.2d at 1396-1401.

deciding the federal statutory issues and to affirm that aspect of Judge Hogan's decision on District-law grounds.[7] They urged that Judge Hogan had exercised pendent jurisdiction and that the District had conceded local-law violations. Respondents appeared to assume, however, that mere violations of District law were sufficient to permit affirmance and addressed the issue of a local private right of action only in a footnote. Respondents took this approach even though one major issue on appeal was whether *Suter v. Artist M.*, 112 S. Ct. 1360 (1992), which plainly distinguishes between statutory violations and violations of rights, barred their federal statutory claims.

In its Reply Brief, the District urged that Judge Hogan had not exercised pendent jurisdiction and that the court should not affirm on local-law grounds because such matters "plainly belong not in a federal court but in the courts of the District of Columbia." Dist. Reply Br. 8. At oral argument, the debate continued over whether there was a local-law basis for Judge Hogan's decision. The District urged:

> The District laws in . . . the mind of the court below, set local law standards, but were not said to be privately enforceable rights, and in fact, if he did state those to be privately enforceable rights, then that is a compelling reason to have abstained in this case because the local courts have not decided whether the District laws provide a right of —

Transcript of Oral Argument 8 (Nov. 4, 1992).[8]

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[7] Somewhat ironically, the *Winston* case cited by respondents would have barred them from raising their pendent jurisdiction argument below because they failed to take a cross-appeal and would bar them from raising their waiver argument here because they did not file a protective cross-petition in this Court.

[8] On rebuttal, the District reiterated this point:

> [Judge Hogan] obviously didn't want to enter an injunction based upon a local statute. He did not purport to decide whether there was a privately enforceable local right under the law. . . . [T]he local courts have not decided that, in fact, there are enforceable rights under Title VI by private parties. That has not been decided, and Judge Hogan did not purport to decide it . . .. This is a local law issue, and it is a case of first impression and should be decided by the local courts.

Transcript of Oral Argument 37.

The D. C. Circuit ruled that Judge Hogan had not exercised pendent jurisdiction; it declined to accept respondents' waiver argument; and it ruled that District law creates rights as part of its exercise of pendent jurisdiction. App. 9a-13a. Whether the D.C. Circuit properly exercised pendent jurisdiction is, therefore, properly before this Court.

Furthermore, the issue would have been properly before this Court even if the District had not addressed the matter below. This Court has ruled that, when a claim is properly before an appellate court, "the court . . . retains the independent power to identify and apply the proper construction of governing law." *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173, 2178 (1993) (a federal appeals court properly decided statutory issue even though the issue was not raised in the district court or in the briefs and oral argument on appeal). Because the D.C. Circuit independently could have examined the law governing pendent jurisdiction, its decision is reviewable here.

CONCLUSION

The D.C. Circuit has usurped the authority of the courts of the District of Columbia to interpret and enforce District law in an area of vital local concern. It has also wrongly denigrated the ability of the District's courts to decide constitutional claims arising from child-custody arrangements subject to Family Division oversight. This Court should grant review to ensure that the D.C. Circuit acts in accordance with the decisions of this Court.

Respectfully submitted,

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